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AN
INTRODUCTION
TO
THE SCIENCE OF LAW

AN
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TO
THE SCIENCE OF LAW

BY
ALBERT KOCOUREK
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AUTHOR'S PREFACE

In the field of jurisprudence, our indigenous works do not present the variety of types known to the Continent. To take but one representative language, the German (which has been the most prolific in the exhibition of juristic types), in but one of the fields of legal science (e. g., formal jurisprudence), we find such varieties as the *Einführung in die Rechtswissenschaft*, the *Juristische Enzyklopädie*, the *Allgemeine Rechtslehre*, the *Pandektenlehrbuch*, the *Juristische Prinzipienlehre*, to say nothing of the examples of *Cursus*, *System*, *Grundriss*, or *Repertorium*. It is the *Juristische Einführung*, especially, which has been little cultivated in our language. The works that correspond in subject-matter with the *Enzyklopädie* are hardly either for the layman or the novice in law. The object of this book is to provide a survey of the scope of law and of some of its ideas, methods, and problems. It is the author's hope that it may be found useful to the law student for a perspective of the domain of legal science and also to the student who is not interested in the practical details of the law but yet who wishes to acquaint himself with an outline of its subject-matter and some of its leading working ideas.

I acknowledge my indebtedness to my friend Donald Donohoe for preparation of the index.

ALBERT KOCOUREK.

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AN INTRODUCTION TO THE SCIENCE OF LAW

CHAPTER I

DIVISIONS OF LEGAL SCIENCE

<p>§ 1. Basis of Classification.</p> <p>§ 2. Temporal Division.</p> <p>§ 3. Past Time.</p> <p>§ 4. Present Time.</p> <p>§ 5. Future Time.</p> <p style="text-align: center;">A. RECAPITULATION</p> <p>§ 6. Legal History.</p> <p>§ 7. Positive Law.</p> <p>§ 8. Legislation.</p> <p>§ 9. Structural Division.</p> <p>§ 10. Past Time.</p>	<p>§ 11. Present Time.</p> <p>§ 12. Future Time.</p> <p style="text-align: center;">B. RECAPITULATION</p> <p>§ 13. Historical Jurisprudence.</p> <p>§ 14. Formal Jurisprudence.</p> <p>§ 15. Constructive Jurisprudence.</p> <p>§ 16. Philosophy of Law.</p> <p>§ 17. Terminology.</p> <p>§ 18. Wigmore's Classification.</p>
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§ 1. Basis of Classification. The subject matter of legal science may be treated from two points of view: (1) temporally; (2) structurally.

§ 2. Temporal Division. The temporal division has three phases: (a) past time; (b) present time; (c) future time.

§ 3. Past Time. Legal history, or the history of legal rules, or the history of legal institutions, ob-

viously falls into the division of past time. The historical approach to law is necessary since it affords the perspective without which existing rules or institutions can not be fully understood. In the Anglo-American system of law in which the literary sources of the law (statutes and cases) extend back often to Norman times, historical induction as a means of forecasting the probable course of decision in modern litigation is a regular professional working method.

The need of the historical approach quite dominated methods of teaching until recent years. The earlier case-books put large emphasis on the process of growth of legal rules. This valuable method, however, suffered the disadvantages, when carried out in logical strictness, of affording too narrow a view of the immense scope of law, and of neglecting the many points of coördination of the law. Recent case-books tend to overcome these disadvantages by a textual condensation of historical facts, leaving more time for analytical comparison of the rules and doctrines that determine legal questions now arising. The historical method, nevertheless, remains important and in many instances indispensable. This is often true even where the common law has been reduced to a code. For example, the Uniform Sales Act cannot be successfully interpreted without knowledge of the cases upon which that codification was based.

The conservative (i. e. the historical) element is stronger in Anglo-American law than in the modern Roman system of law of Europe. This is due to various influences, the most important of which are: (i) the traditional view that case law represents a more rational and more accurate sense of justice than legislation; (ii) the rule of law that statutes in

derogation of common law are to be strictly construed; (iii) the absence of a scientific legislative technique; (iv) the lack of a scientific terminology widely accepted and generally understood. The nature of these underlying causes makes it certain that the historical factor in Anglo-American law will long remain of first-rate importance.

§ 4. Present Time. Present time is the phase which includes all the legal facts which control existing questions of law. Historical facts are carried over into the present, and the effort of the lawyer is to possess a professional equipment of technical knowledge having present validity. More than nine-tenths of the courses in the law school are devoted to the problem of answering the question, What are the existing methods of solution of legal problems? And incidentally, What are the solutions of these problems?

It is a rule of our law that judicial decisions are not in themselves an ultimate source of law but are only evidence of what the law is. This rule is known as the Declaratory theory of precedent. Where there is a series of conflicting decisions on the same legal question in the same jurisdiction, as thus, the series, *a, b, c, d, e*, the last decision, *e*, *prima facie* is the best evidence of the rule of law; but this evidence may be rebutted and it is possible that the next decision in the series will be an entirely new letter, *f*. The Declaratory theory is affected by another rule of law called the rule of *Stare decisis* according to which, in general, inferior courts are officially obliged to follow the rules applied by superior courts. To a large extent, courts of last instance (usually called Supreme courts) also follow the rule of *Stare decisis*.

According to the Declaratory theory, the actual rule of law which is assumed to be already in exist-

ence is never directly encountered and the nearest approach to the rule is evidence of the rule; but, as we have seen, this evidence is rebuttable, so that, as a matter of theory, we never can be certain that any given application of law is correct or that it has finality.

This theory is highly interesting and serves a very useful purpose in connection with the rule of *Stare decisis*. The Declaratory theory grew up to conceal the fact that judges make law; the theory is that they only apply it. While the purpose was to cloak the real fact, the consequences were wholly uncalculated. It has been a very powerful instrument to enable the law to grow in accordance with economic changes in society. While it is unthinkable that the forces of social expansion could have been confined by explicit recognition of the fact that the great bulk of the law known as the common law was either originally created out of new conditions or has been officially formulated on a background of custom and a common inheritance of social order, yet the fact remains, that this magnificent fiction operating by indirection has been the chief instrument which has given our law its specific character of mobility and democracy. It has been amenable to change and growth at all times in proportion as the need has been clearly seen; but, of course, not evenly or methodically, or even responsive in all cases where the need of change has been insistent. These necessary alterations have not awaited the initiative of legislatures or of ministries of justice, but have been made from case to case. They have arisen out of the heat of concrete legal controversies, and while the actual official formulation of these changes has been made by the courts, the moving cause of these adjustments has been the work of the bar and the conflicts of interest

in human society. In this lies the factor of democracy in our law. All of those who coöperate in the application of law have been and are instruments of law-making. It has been and is a democracy not of the multitude but of intelligent men. The law has come, not from above, ready made, as in the countries of modern Roman law, but from the living soil of life.

The Declaratory theory in action has a centrifugal tendency to leave the law in a somewhat uncertain state for the need of predictability, but the companion rule of *Stare decisis* has operated to prevent the tendency from exceeding the limits of reasonable practicality. It is probable, however, that this process of evolution is reaching an end. The sources of our law are becoming exceedingly difficult to deal with because of their wide range in the historical dimension and because of the great bulk of reported decisions. Out of these rich materials it is now desirable that there be collated in systematic form the living structure of the system now lying unorganized in many thousands of volumes of reports.

An important beginning in this direction has already been made under the auspices of the American Law Institute. The Institute operating with ample funds and under able management purposes to make a statement in systematic form of the prevailing rules and doctrines of private law. The actual work is being done by distinguished specialists assisted by specialist advisers. It is the hope of the Institute that its final statement of the existing law will be accepted as *prima facie* authority by the courts. It is clear that this important program falls much short of official codification but it is equally clear that official, uniform codification of all the law in the States of the United States is unattainable at this time.

Reverting, now, to the question concerning the time dimension in which the lawyer's work lies, we have seen that present knowledge of existing law is the chief aim for a professional equipment and that the same knowledge chiefly concerns the law student. But we have also seen that actual knowledge of the law is impossible under the terms of the Declaratory theory. Yet this theory, however valid and valuable, as a constitutional theory of the system of precedent, must not be permitted to obscure the facts. The fact, important here to notice, is that while the courts have no greater access than others to the mysterious law implicated by the Declaratory theory, yet the courts decide controversies as if the applications made were the highest legal truth. It is that concrete and practical application in which the lawyer is interested and the essence of his work is to predict what these applications will be under given facts. His skill is measured very largely by the success he attains in these predictions. It will be noticed that he predicts not what the law is or what it will be, but rather what, in a given case, a court will do. There are two things clearly distinguishable here: (1) the actual law which can not be known ultimately; (2) legal phenomena. It is common to regard these phenomena (i. e. the decisions of courts) not merely as evidences of law but as law itself. For convenience we shall speak of the law which underlies the Declaratory theory as the *Ideal* law and we shall call the product of the efforts made by judges to attain that Ideal law in the course of litigation, the *Applied* law.

The decision of the court in a law-suit is an adjudication between the parties which settles their rights; it is the law of, and for, the case. But all Applied law is legal history. It may be very recent

history but history it is, nevertheless. There is not and can not be absolute certainty that a decision just made will be followed even in principle in the very next case to be decided by the same court. A different view of the Ideal law may arise from a slight variation in the facts resulting in an essential conflict in the Applied law. In matters of detail, these conflicts of Applied law are very numerous in any single State in the course of a few years. Courts of appeal (so-called appellate courts, supreme courts, courts of error, etc.) are commonly, though not always, collegiate benches. Where opinions are delivered in writing, in collegiate benches, the work of the court is divided among the members of the court, and it sometimes happens that where a number of decisions are rendered in as many different cases, conflicts in the Applied law will be discovered after the written opinions are published. The contingency of error is large in keeping the Applied law of any State consistent and these departures arising out of error frequently perpetuate themselves under the rule of *Stare decisis* as new rules of Applied law under the guise of distinctions. Much of the Applied law owes its origin to pure error, but these errors, once established, become as enduring as the Applied law which consciously seeks to approximate the Ideal law.

There are, therefore, two forces constantly at work: (1) the tendency to depart from the Applied law under a conscious impulse to correct injustice; (2) the unconscious tendency to depart from the Applied law under the influence of error. These two factors of growth are sufficiently pervasive to make the task of predicting the application of law very difficult, especially when we consider the enormous bulk of the law and the fact that the rules must be

extracted from particular cases, each having its own special background of facts which must be measured carefully in order to test the value of its future application.

We come then to the point that the law used in the decision of cases is not an existing body of rules but is a *becoming* body of rules. The work of the lawyer accordingly looks always to future time. The predictions of law, it is true, rest in the present dimension of time, but the subject matter of these predictions falls in the dimension of future time. The Ideal law, on the other hand, theoretically is unchangeable. It is the most rigorous form of Natural Law disclosed by any actual system of law and this fact needs to be emphasized for a correct understanding of the nature of Anglo-American law.

§ 5. **Future Time.** If the Actual law is a body of rules in the process of becoming or more accurately is a body of applications of Ideal law in the process of becoming, we have already a very important subject matter of the future time dimension. It will suffice, if there be added the work of the legislator. All legislation, of necessity, operates in future time, even where, as in *ex post facto* legislation, it seizes on past situations of fact. So far as legislation creates duties or powers, they must be future duties or powers. It is not otherwise in the case of Applied (case) law which creates only prospective duties or powers which grow out of past situations. If this is not at once clear, it may be put in this form: There can not be today a duty or a power to do something yesterday. The facts of yesterday may be the occasion for the creation of today's duty or power; and while rules may have the appearance of retroaction they must in fact be prospective in operation.

It is not proper, therefore, to speak of *retroactive* rules of law, but it is allowable to speak of *retrospective* rules, since such rules while made in consideration of past situations have their only force in future time.

A. RECAPITULATION

§ 6. **Past Time—Legal History.** The past time dimension includes such topics as legal history of rules, institutions, and movements, and biography of lawyers and judges. It includes also all case law and all legislation already enacted. History has no time limitation as to remoteness. A case just decided or a statute just enacted is as clearly legal history as if the case or the statute were a century old. It follows from this that the chief working apparatus of the lawyer or of the law student is legal history. It is true that a judicial opinion whether just published or even just delivered, or whether from the Year Book period, may have *present* force and vitality affecting the Applied law of the future but there is an important distinction between what is done (adjudicated) or said (reasons given for a decision) and the logical force that follows from what is done and said. A court in making a decision has no control over the logical or causal effects of that decision as it may influence future litigation. The court only can decide an existing controversy and give such reasons as it may for the decision. The logical or causal effect on future litigation may be: (i) that neither the adjudication nor the explanation of it may be accepted; (ii) that the adjudication may be accepted as correct but the explanation may be rejected as erroneous; (iii) that the adjudication may be rejected as erroneous and the expla-

nation be accepted as correct. The court making the decision, has, it must be plain, no control of the future of the force that will follow what is done and said. This equally is true when the judge is the same judge in both cases, since there are instances enough to show that the same judge in a later case has refused to follow either his adjudication or his explanation of an earlier case. The philosophical explanation of this phenomenon is that any future fact is determined not by one line of force but also by all other converging lines of force. A decision with its accompanying explanation is only one line of force among many others. It also may be noticed here that when a court decides a controversy it delivers an 'opinion.' The word is well chosen to characterize the non-conclusiveness of judicial acts.

As to legislative enactments, it might seem on first impression that the explanation given for ease law does not accurately state the fact for legislation; but no exception can be made even for legislation; it is only legal history after enactment, no matter how recently or how remotely.

There is no Declaratory theory of legislation. Legislation, in theory, does not declare what the law is or is to be; in theory, it makes law. Courts in applying law do not have authority to set aside the legislation of the State on the ground that the legislation is unreasonable or illogical, if the meaning is clear and there be no constitutional question of its validity. If the meaning is clear the courts must apply legislation according to that meaning. But a statute must consist of words. What these words mean singly or in combination and what is the logical meaning of a statute as a whole, must be determined when the statute is applied. The chief governmental agency for determining the meaning of

statutes is the courts. The most important practical effect of legislation is the application of legislation in concrete instances. The legislature can not dominate that application. Application is always a fact future from the point of enactment of a statute. That future fact is dominated by all the converging lines of force that exist at the moment of application. The legislature has only produced a context of words. These words will usually have a meaning, but the meaning in the mind of the draftsman of a statute may not be that in the mind of the judge who applies the statute. Here, again, instances may be adduced to show that the meaning of the draftsman, later declared unofficially, was not in accord with the meaning of a court applying the statute. It is common to speak of the 'intention' of the legislature, but it is apparent that there can not be such a phenomenon as group cerebration. The 'intention' of the legislature is only the meaning given to a statute by a court when applying it. The actual draftsman of a statute no doubt had an 'intention' but the rules of evidence do not permit him to state that 'intention.' The meaning of a statute must be ascertained objectively from the words alone of the statute. No anterior subjective fact enters into it. Therefore, while there are various practical differences between legislation and case law from the point of view of the attitude of courts toward them, yet fundamentally they are the same in being only historical facts which, in greater or less degree, produce forces which influence the course of litigation.

In earlier centuries, when the Imperative theory of law was dominant, it was supposed that legislation directly determined future rights. This theory, the companion of the Declaratory theory of case law, was much simpler than is the fact. The more re-

cent studies of Anglo-American jurists have avoided the error of attributing to legislation an independent, self-sufficing, and automatic operation, but some of the modern views have gone to another extreme of supposing that law is only that body of rules and principles applied by the *courts* in the administration of justice, in contrast with all other agencies of government.

§ 7. Present Time—Positive Law. The present time dimension includes all presently existing facts and forces. Some facts exhaust themselves at existence; others endure for greater or lesser spaces of time. The chief feature of this dimension from the point of view of the professional lawyer is ability to appraise correctly the force and direction of the facts of legal life that determine litigation. The work of the lawyer is not like that of a chemist who finds qualitatively and quantitatively what is in a test tube. The subject matter with which the lawyer deals is a subject matter in motion. The lawyer therefore must be able to say not only what is now but also what will be or more accurately what probably will be.

Law once applied is legal history, but law about to be applied can be known only on the basis of prophecy. The present dimension is essentially a very narrow one, and so far as law is knowable it is knowable only as a complex of hypotheses. It has been the mistake of nearly all the older theories of law to suppose that law is a product which unfolds in a purely deductive way; that there are certain determinable axioms and postulates from which every variety of legal application must follow by logical necessity. These antiquated views represent only an ideal which never has been attained and which probably

is unattainable for two reasons: (i) the facts upon which law operates are too complex for complete logical inclusion in one verbal system; (ii) the verbal system and the facts upon which the system is to operate are dynamic. Legal logic may hope to do much to minimize the first of these difficulties, but the second difficulty is irremediable.

Change is a constitutional factor of law; law is not something in existence; it is a perpetual becoming. Acceptance of these statements does not result in a juristic Quietism; it does not negate efforts to approximate the illusion of certainty. The great problem of legal science is to attain a more binding logical connection between the present and the future but in the nature of the problem, the logical connection of these two dimensions of time can only become a greater and greater approximation. The point here is illustrated by the numerical value of π . It has been demonstrated that the problem is insoluble and so, likewise, is insoluble a direct logical connection of a present verbal system of legal ideas and future legal facts to which this verbal system is to be applied.

It should however be stated that in spite of the very extensive wealth of source material which has accumulated for some seven centuries in our system of law, the best professional legal talent does not find our legal system entirely logically rudderless. The fact that our legal system still pretends to be based on a logical basis of ideas is itself a symptom that the source material can still be mastered. Our law as applied, however, is tending, more and more, to become a system of discretion; the art of prediction is becoming increasingly difficult; and there is already great need that the great mass of accumulated historical facts be coördinated in compact form.

That new form, whatever it may be, nevertheless will be subject to the inherent process of change which dominates all living structures.

The emphasis in the foregoing discussion has been on the actual nature of legal phenomena as they are, and considered as a whole. It should, however, also be observed that the professional work of the lawyer must and does disregard all or the greater part of the influences bearing on legal phenomena falling outside of logical force. This matter will be considered at another point. There is, therefore, a distinction between the actual causation of legal phenomena and the methods professionally employed to produce these phenomena. Accordingly, it is no part of the *professional* equipment of a lawyer to calculate or know the influences of bias, prejudice, class feeling, moral, economic, or scientific beliefs of individual judges, however important they may be in specific litigation. All such and similar facts enter into legal causation but knowledge of them is not a part of professional knowledge even when the facts can not and will not be ignored in actual litigation, in the practical use of logical methods.

§ 8. Future Time—Proposed Legislation—Application of Law. The future time dimension obviously includes all that is left in time after consideration of the past and present dimensions. The most important feature is the law about to be applied. It also includes proposed legislation. The whole matter may be summed up by saying that the legal expert is interested in all relevant past facts of law (cases, statutes, etc.) for the purpose of present prediction of future legal phenomena immediately following.

§ 9. Structural Division. The structural division of legal science has no time compartments. It is based on the nature of the subject matter of legal science. The subject matter of the temporal division is itself temporal; the subject matter of the structural division is non-temporal. The fact that a statute has been enacted is a temporal fact because there is nothing in the nature of a statute of a permanent nature; it will certainly, in the course of time, fall into desuetude. Likewise judicial decisions and the rules of law which they involve are temporal facts; they, also, sooner or later, will fall into desuetude.

If, however, there can be found in legal science facts comparable to Grimm's law in phonetics, or Mendel's law in biology, or the law of diminishing returns in economics, then we will encounter materials not affected by the mere element of time. That there are such structural, non-temporal-facts will be shown. Since these structural facts are built up on concrete phenomena of law, it will be desirable to consider structural facts in connection with the legal phenomena to which they relate. This will necessitate use of the same tripartite division of time already employed. For reasons to be explained, we shall qualify all temporal facts by the term 'legal,' using the noun 'law,' and we shall qualify all structural facts by some variation of the term 'jus,' as 'jural' or 'juristic.'

§ 10. Past Time. The first compartment of the structural division, relating the two ideas under one expression, is Historical Jurisprudence. Historical Jurisprudence is concerned with historical legal facts for the purpose of ascertaining the constitutional elements and factors which determine or which probably determine concrete legal phenomena.

It is sometimes questioned whether such underlying determinative forces exist; it is sometimes stated that legal phenomena are so complex in nature and are produced under influences so diverse and uncertain as to make impossible any scientific statement of the growth of law.

This view certainly is incorrect. No doubt many generalizations of legal growth which have been tendered are faulty but the many striking facts discovered in a comparison of historical ideas can leave little room to doubt that the course of the law's development, within limits, is predictable. Predictability can be based only on certain basic uniformities in the actions and reactions of the human elements that produce legal phenomena. Historical Jurisprudence is perhaps still in a stage of scientific adolescence, as are also the other departments of legal science, but enough already is available in the materials for research to make a respectable beginning of a true legal science. The doubts that have been entertained upon the matter probably have arisen from a mistaken view of the nature of the process of legal growth. Having in mind that statutes are the product of the initiative of a few leaders and that the draftsmanship of any statute can be identified always as the work of one or of a few persons; and having in mind that concrete judicial decisions are reasoned and are likewise attributable to the efforts of a few identifiable persons, it is supposed, that the element of contingency is too great to admit scientific probability in the growth of law either in concrete instances or in general outline.

The conscious element in law is thought to be too predominant to admit any reasonable certainty of prediction of future legal phenomena. It may be observed at this point that lawyers attempt to ad-

visé clients on the basis of what courts will do, in the future, on present, given facts. That the art of professional prediction is on a sound pragmatic basis needs hardly to be affirmed. At any rate, this art still continues to inspire confidence. But the art of legal prediction on given facts, while satisfying the needs of the practical world, is still too insecure to meet the needs of what pretends to be science. That a more rigorous test of probability can be employed in Historical Jurisprudence is due to the fact that legal phenomena in the mass are not consciously produced. In the growth of law, as in the growth of language, conscious elements play their part, but unconscious factors predominate. The reaction of an individual to a given situation may be very uncertain but if his habits are known, these reactions can be predicted with reasonable practical assurance. This is possible because the reasoning process has become unconscious at the point where habit enters; but for the individual there is so much more than habit that directs the course of his life that the scope of what can be predicted as to his conduct is narrow. When, however, we are dealing with large groups of individuals the reactions of these groups, as groups, is an unconscious process since there can not be a group mind. Much, no doubt, remains to be discovered concerning the reactions of groups but the history of law already furnishes abundant material for the basis of a science of the growth of law. This science, no doubt, has suffered in credit from over-enthusiastic efforts at too much simplification and from hasty generalizations; but, in the end, in the normal course of the development of science in general, it will take its place alongside of the science of Philology which is based on comparable materials.

The detail of what is meant by a science of the growth of law can not be shown here but the general scope of Historical Jurisprudence may be indicated. For example, it is not a mere historical accident that universally, i. e. in all systems of law, public acts in law were ceremonial and that private acts in law were symbolical. A codification of law, and especially an early codification, does not deal in general with what is settled and accepted but rather with what is controverted and uncertain. As soon as a legal rule which can not for political or other reasons be formally abrogated, meets opposition of sufficient force, the rule either is overcome by a fiction or else it falls into disuse. Needs felt by powerful groups and persistently sought will tend to be satisfied either by direct legislation (by the legislature), by indirect legislation (by the courts), or by a new application of law (fiction). If two coördinate systems of law (e. g. law and equity) are administered by the same magistrate (e. g. the Roman prætor), the two systems eventually will become fused into one system. If, however, the same two systems are administered by different magistrates (e. g. the law judge and the chancellor in the Anglo-American system) the process of fusion will be long deferred. Finally, as illustrative of the content of Historical Jurisprudence, it may be affirmed boldly that the Anglo-American system of law eventually will be entirely codified. This same prediction could as safely have been made a hundred years ago, since it does not rest merely on the widespread discussion of the need of codification and the movements in that direction (e. g. the various uniform commercial acts widely adopted in this country) but, rather, on the need itself.

Historical Jurisprudence may draw its materials from a single system of law with a long history such as the Roman law which was politically self-contained for about two thousand years or such as the English system which with its Germanic roots can be traced for more than a thousand years. But since Historical Jurisprudence differs from legal history, in that Historical Jurisprudence seeks to find the uniformities which govern the growth of law, and is not concerned with a mere recital of concrete facts, it may draw its materials from any legal system whatsoever.

Historical Jurisprudence is divided into two great fields: (i) the field of primitive law and (ii) the field of developed law. For the purposes of primitive law, elaborate studies have been made of nearly all known savage and barbarian peoples, within the last hundred, and especially within the last fifty, years. For developed law, the Roman law, especially of ancient times, has been intensively studied and most of the material is drawn from that source. Although the English system already presents a large body of facts upon which Historical Jurisprudence may operate, this system has been little used for source material, perhaps in part and chiefly due to the fact that only within recent years has there been available an adequate history of the English system reaching up to modern times.

Comparative law is a field of research closely allied to Historical Jurisprudence. If the object sought by a comparison of different legal systems is to discover the uniformities of legal growth, then such a study under whatever label is research in Historical Jurisprudence. If, however, the object of investigation is simply a collation of the uniformities and differences in the laws and institu-

tions of different systems, without any effort to establish any structural facts arising out of such comparison, then such an investigation falls into the temporal division of legal science. In that case, the facts may be entirely past facts, having no present vitality, or the facts may have present vitality. Depending on the character of the investigation, such studies, therefore, are either of temporal or of structural facts; and, if temporal, these facts may be of past time or of present time. If the facts are structural, there is difficulty of classification because of different possibilities of point of view. For example, Historical Jurisprudence is classified as of past time because all the data of research are historical but yet the object of such a study is to develop truths of timeless validity. Classification here may be made upon any convenient basis and the matter has little, if any, importance, except in the convenience of arrangement.

§ 11. Present Time. Formal jurisprudence is the term sometimes used to indicate the present time dimension of the structural division of legal materials. The corresponding term used for the temporal division is Positive law. When the term Positive law is used there is implied a body of knowable rules of law ready to be applied, but we have already seen that when we speak of law we may have in mind any one of four things: (i) the ideal, unchangeable, law involved in the Declaratory theory; (ii) the official historical sources of law (principally adjudicated cases and statutes); (iii) the body of hypotheses as to what application of force will be made on a given state of facts, and, as a consequence, the governing rule or rules; (iv) the rule which actually is about to be applied which becomes historical at

the very moment of application. It is sometimes difficult to know which of these possible meanings is intended when law is the subject of discussion.

Formal Jurisprudence, the structural contrast to Positive law has two divisions: (i) Analytical Jurisprudence and (ii) Theoretical Jurisprudence. Each of these terms needs explanation.

Analytical Jurisprudence. Analytical Jurisprudence may be likened to the chemistry of law, or, again, to the pure mechanics of law, or, finally, to the anatomy of law. In France, the term Pure law (*droit pur*) has been used for the same field, and in Germany the expression General legal theory (*Allgemeine Rechtslehre*) has been employed. Still another figure of speech may be used to explain the province of Analytical Jurisprudence. In every language whether of the isolating or of the inflected type, there must be symbols of nouns, that is to say of things; of verbs, that is to say of active words; of adjectives, words that describe nouns; of adverbs, words that describe verbs; and finally of more or less importance, conjunctions, prepositions, and interjections. No developed language can be found or can exist without these elements. So, also, in the law, there are certain basic ideas, or as Austin has put it, "pervasive" ideas, which are found in all developed systems of law. Without them, developed law could not function or even exist. These basic ideas in law are State, Sovereignty, Law, Jural Relationship, Personateness, Facts, Things.

Of the above enumerated seven basic ideas which are the most important of such ideas if, indeed, the list is not exhausted by their enumeration, the latter four, Jural Relationship, Personateness, Facts, and Things, are the groundwork of Analytical Jurisprudence. At a later point, they will be discussed, each

in turn. Each of these terms has many varieties. The law creates a very extensive network of jural relationships which embraces every human being within the present or future power of the State. As will be shown later, jural relationship is the formal technical lever upon which all legal operations are based. There are probably a score of important varieties of such jural relationships.

Personateness also is a basic idea. No legal relation can exist without persons at the two poles of such a relation. A legal relation may be compared to an electric battery with a positive and a negative pole. These jural poles are represented by persons but it may be noticed here and be explained later that 'person' in a jural sense never means a human being, and that personateness (i. e., the quality of being a legal person) is purely a concept. There are various kinds of legal persons such as private persons (e. g. the legal persona of a human being) and public persons (e. g. the State, or a court).

Facts are the causes of legal phenomena. There are two classes: Acts and Events. Acts have a human cause; events do not have a human cause.

Things, also, constitute a fundamental element. Things are the objects for which jural relations exist. Every jural relation, therefore, is realized in a Thing. For example, an undisturbed condition of lands and chattels is the object realized by rights (claims) against trespasses.

Out of these four basic jural ideas, the whole system of law with all its uncounted applications and enormous scope, is constructed. That being true, it is necessary that these ideas be carefully investigated and be clearly understood, since erroneous views of their nature may lead and demonstrably often do lead to practical results which disturb the

symmetry of the law and, what is of more importance, produce miscarriages of justice.

It is the mission of Analytical Jurisprudence to isolate from the great mass of available legal material the enduring elements which recur endlessly in concrete legal phenomena, and to analyze and arrange these elements into an abstract system or classification. While the chief function of Analytical Jurisprudence is, no doubt, as the name suggests, analysis or decomposition of the subject matter of law into irreducible elements, that is not its only function.

It is necessary that these elements when isolated be used as a basis for a synthetic reconstruction of jural ideas into a complete classification. In this aspect, Analytical Jurisprudence may be creative; it may point out possibilities of new institutions unknown to a particular system of law.

The empirical materials of Analytical Jurisprudence may be taken from one system of law or from several systems of law. Where a foreign system of law has been used, the Roman system has often been resorted to because of the great wealth of its institutions and because of the fact that much of the labor of analysis and synthesis necessary for a complete scientific arrangement of legal ideas has already been done for that system either by Roman jurists, or, in later centuries, by jurists of other countries.

Analytical Jurisprudence not only may have a constructive function in showing the possibilities of new legislation in the creation of new institutions, new relationships, and new methods of furthering existing relationships, but it has also the very useful purpose of presenting in a systematic and compendious form, after the labor of analysis has been brought to completion, the whole system of law in its groundwork.

The Anglo-American system of law has richer and more extensive resources of historical materials than any other system either past or present. Our system also has developed a pluralism greater than has been exhibited in other systems. There is not simply one system of law but there are numerous sub-systems of law, so unique in their subject matter and methods as to have the appearance of being independent of each other. This contrast is expressed by the terms General law and Special law.

The term General law is applicable to persons of normal legal capacity in relationships not modified by special circumstances. Special law is constituted of various satellite systems appendant to the general system and operating with rules and methods to a considerable extent peculiar to each of these sub-systems and departing also to a greater or less extent from the rules and methods of the general system. For illustration only, at this point, General law embraces among others the fields of rules concerning Property, Contracts, Torts, etc. Special law embraces, among others, the fields of rules concerning Admiralty, Bills and Notes, Infants, Married Women, Industrial Accidents, etc.

Another cross-division is the division of the system into a law system (the system of rules developed by law judges and by legislation) and an Equity system (the system of rules developed by the chancellor and courts of equity). Another cross-division is that of Criminal law and Civil law. In the United States there is still another cross-division of State law and Federal law. Often there are very important differences in different parts even of the same division of the system. Thus, the laws of Land and Chattels coincide as members of the same division; they are respectively parts of the

same divisions of General Law, of Civil law, and of Law or Equity, yet in important particulars the law of Chattels differs from the law of Land.

From this brief statement it may be seen that the Anglo-American system of law is very complex in respect to the historical dimension of the great wealth of sources and also in the horizontal dimension of the complex division of the subject matter. In the United States, this complexity is accentuated by two additional facts which do not occur in England: (i) the division of State and Federal law and (ii) the large number of independent States each of which influences all the others in the application of law. The study of law in America is more difficult than anywhere else in the world. In order that the practitioner of America may be able to perform his professional task, of necessity there have grown up very efficient tools in the form of specialized reports, annotated reports, reports of selected cases, digests, citators, encyclopedias, highly specialized text-books, and other devices, including advance reports and advance digests. Nowhere else in the world is the law more difficult and nowhere else can there be found a more astonishing equipment of professional tools for dealing with the stupendous accumulation of material that represents the basis of persuasion and prediction of the law to be applied.

While our law is rich to repletion in the raw historical sources, yet in contrast it is highly deficient in theory. At this point, our law suffers in comparison with modern Roman law. Our very elaborate finding apparatus leads only to the raw materials. There are few approaches to a theoretical coördination of the mountainous mass of legal rules. To organize and analyze these underlying theories is another of the important functions of Analytical Jurisprudence.

The whole matter may be summed up in this statement: The historical materials of our law are already so vast that no human mind can know more than fragmentary parts of the whole; there are literally hundreds of thousands of legal rules. There has been up to the present time no official way in which these rules could be gathered together into larger and larger groupings. It has been necessary to attempt this by means of text-books in special departments of the law and by similar devices. All these efforts need to be aided by a structural view of the law as a whole, including two chief elements: (i) the osseous framework of the law properly articulated on a juristic basis; and (ii) the typical methods for the solution of legal problems.

Analytical Jurisprudence can not in general predetermine a solution, but it may determine whether a given method of solution is applicable. It is plain that if Analytical Jurisprudence could determine how a given controversy should be decided there would be no need of the historical sources; Analytical Jurisprudence, itself, would suffice. But while Analytical Jurisprudence can not claim the mission of giving answers to the material problems of legal justice it may in a powerful way aid legal justice by giving it a rational foundation. It must be remembered that Analytical Jurisprudence does not create its premisses; these premisses are furnished by the law itself. It is the function of Analytical Jurisprudence to accept these premisses and to decompose them into their final atomic elements in an organized juristic system. In this aspect, Analytical Jurisprudence becomes the logic of the law.

Theoretical Jurisprudence. Theoretical Jurisprudence is concerned chiefly with the basic concepts State, Sovereignty, and Law. An effort is made to

determine the nature of the State and to formulate its functions. These inquiries sometimes are of great practical importance. In the field of International law there are various kinds of States, and the relations that they may sustain to other political units may rest on the particular qualities which the State in question possesses. Many of these problems overlap the fields of International law, political science, and public law. In American law, a precise determination of the functions of the State and the limits of these functions is of importance because of the theoretical constitutional separation of powers into executive, legislative, and judicial functions. Much litigation has arisen on these questions and the results achieved by judicial solutions leave much to be desired. The whole subject still demands theoretical clarification.

Much of the controversy touching a separation of powers arises from two causes: (i) the State has other functions than to make laws, to adjudicate controversies, and to make concrete applications of laws. No doubt these functions are the chief ones but when other functions are in question, difficulty is found in making a proper classification. One of the most important of these additional functions of the State is the administrative function. Using the term 'administrative' in a wide sense, it includes for example all the preparatory acts of the government leading to formal law-making; similar preparatory acts directed by a court as a precedent step to formal adjudication; and also similar acts authorized by the executive department of the State. In like manner, after formal law-making or formal adjudication, there may be various subsequent acts authorized or directed to carry out the details of a statute or of a judicial decision. 'Administrative' also in-

cludes all or most of the official acts of executive officers of the State in their dealings with each other and in the control and management of the funds, property, and accounts of the State, or of a subdivision of the State.

The principal difficulty created by the exercise of administrative functions is that in general, judicial or legislative functions can not be delegated. Where a system of courts is established and a law-making body is created for the enactment of statute law, all the powers of adjudication and of direct making of legal rules must in theory be effected by these established agencies. The great development of machine industry, commerce, and transportation in recent decades has brought extensive changes in the older view of a rigid separation of powers. The need of detailed regulation of such matters as rates of transportation, food standards, weights and measures, health, fair business practices, use of public ways, public sale of securities, insurance, industrial accidents and a variety of other matters has led to a very important departure in the scheme of government law-making and adjudication by commissions created by the legislature with appellate powers in the courts. This movement which has taken on large proportions, and which has created a body of Special law hardly less important in practical importance than the older General law, is sometimes regretted as destroying the old landmarks and as undermining the basis of law as best exemplified in the work of the courts; but it is inconceivable that either the courts or the legislature could, in their present form of organization and methods, have responded to the economic needs which the commission form of government has supplied.

This movement has received the reluctant approval of the courts and it may now be said to be securely established. Moreover, it responds to the demand for specialization in the functions of government and the commission plan carries an advantage that is not to be found in formal legislation. The acts, whether judicial or legislative, of a commission stand, in general, on the same footing, before the courts, as city ordinances. Not only must they be in accord with the statute law but, also, they must be inherently reasonable. This new form of government has, however, added a new difficulty to the work of the practicing lawyer; he must seek the basis of the applicable rule not only in the older sources of cases and statutes, but he must now also keep abreast of the regulations of commissions and of their own interpretations of their own rules.

(ii) Another cause of the controversies that arise and have arisen concerning a separation of powers is the fact that it is impossible to separate sharply the functions of adjudication, legislation, and execution in the practical operations of government. For example: not all the work of a judge is adjudication. A large part of the work of a judge is hearing or reading testimony, hearing or reading arguments of law, and consideration of facts and law. All of this work is preparatory to adjudication. It is administrative labor. Adjudication is only the culminating point of much administrative work. Again, a judge may make rules of court; this is legislation. If, therefore, the actual daily work of a judge be analyzed, it will be found to be a mixture of adjudicative, administrative, legislative, and, perhaps even, in inferior courts, executive functions.

The work of the courts is not only to apply law, but, if necessary, to make law. Statutory law repre-

sents but a small fractional part of the whole law in our system, and when it is seen that statutory law is only, in general, the raw material of new law, it represents in substance even a smaller fractional part of the whole. Law-making by the courts is inescapable. A court never says in litigation "there is no existing rule for the present case" or "we can not find a rule for this case." If there is no rule, or if the court can not find one already fashioned, it will make one *ad hoc*. It is somewhat curious, however, that the courts have always been sensitive about acknowledging the fact that they do and must legislate. The fact of legislation is screened by the diaphanous mask of the Declaratory theory of law. This form of law-making is called 'indirect legislation.' If the work of a legislature be analyzed, it will be found that it may exercise judicial functions as in trials of impeachment, or for contempt, or in passing on the eligibility of new members; it may vote money and direct the erection of public buildings; it may direct the bestowal of a public medal of distinction or a private pension; it may vote a resolution requesting a course of action without any power to cast any duty to comply, as when a state legislature makes a request for congressional legislation or asks for a conference with members of another legislature; and, in various other ways, the organ of government called a legislature may exercise other than strictly legislative functions.

As illustrative of the main point under consideration, it is still a matter of professional discussion, whether legislatures have not usurped from the courts the exclusive power to make rules concerning the forms of procedure in the courts.

The second major topic of Theoretical Jurisprudence deals with the idea of Sovereignty. Much the-

oretical difficulty has been encountered with this concept. Sovereignty is indivisible but there may be sovereignty for one purpose and not for others. In the same reference, there can be but one indivisible sovereignty. Thus, each State of the United States is sovereign as to its local law, even though this local law is subject to certain negative limitations imposed by the federal Constitution. The fact that such limitations exist does not derogate from the fact of sovereignty outside the range of these limitations. Sovereignty, for this purpose, simply implies the most ultimate political authority to act without constitutional control from another source, and the power to make that act effective by use of physical force without constitutional interference or control from another source.

The federal Constitution is a grant of power from the States to the federal government; powers not granted are reserved. Certain powers are reserved by the States, subject to a power of interference where these reserved powers are exceeded. This is the typical case where State legislation is attacked as unconstitutional under the Fifth and Fourteenth Amendments. Outside these (and some other) limits, the State is sovereign as to its domestic law. A municipality, on the other hand, while competent to legislate in its own municipal affairs, derives its powers from the State with which it is politically connected; it acts under a grant of power; and, therefore, a municipality can not be a sovereign.

A State by treaty may have agreed not to legislate in some particular way as against foreigners, but here there is no political control from the outside. The foreign State can not abrogate a law of another State contrary to the treaty, but is limited to the remedies of persuasion, arbitration, or force. Any

application of force in such case would be extra-legal, however just the merits, for the reason that there is no political organization of sovereign States. The idea of political control here would require some form of super-State or *civitas maxima*.

Sovereignty is a matter of form rather than of substance. For every power of government there must be a final source or a summit of authority. Without this concept, the idea of State or of Law would be thrown into irreparable confusion. Yet, while sovereignty is primarily a matter of form, in the last analysis it also submits to the most rigorous test of substance and material power. This may be illustrated in various ways. In International law, each sovereign State has been, since the time of Grotius, the juridical equal of any other State, regardless of the extent of its territory, population, or economic or military resources. Thus, the weakest State is the juridical equal of the strongest. Sovereignty, however, is not an independent and purely abstract concept, but is manifested in concrete powers of government. A State, as already suggested, may be sovereign in one or more powers and be dependent in one or more other powers. What is of chief concern here is the question of juridical sovereignty. This is determined by the ultimate constitutional source of authority to choose the governing rule. Casual and irregular interferences with the powers of a State by threats of war do not work against sovereignty, but a regular and habitually accepted power to supervise the powers of any State, destroys its sovereignty in those respects.

This may be illustrated in another way. In every State there is regularly a certain amount of criminal disobedience. There are thefts, burglaries, arsons, forgeries, batteries, and homicides. These

crimes, for a given country, follow a regular statistical curve, and can be calculated with the same assurance as a mortality table. They are all assaults against juridical sovereignty but they are lacking in physical force to overcome it. But even if criminal disobedience reached the point where the sovereign force of law became ineffective to control it, that would not of itself be the end of the law's sovereignty if, in other fields, the law's sovereignty was still maintained. At the most, the situation would be one where certain laws have ceased to be enforceable.

Sovereignty does not imply omnipotence. Perhaps no State standing alone could oppose successfully a coalition of all the other States of the world, and even the weakest and smallest State remains a sovereign, although it could not hope to be able to maintain its treaty claims or the claims recognized by general international law, by the use of force. So, also, the State with respect to its own subjects is not omnipotent. There are limits in the enforceability of law. This consideration and the fact that political structures are artificially superimposed on natural human groups, associated economically and in various other ways, has led some writers to the very extreme view that there is in fact no sovereignty but simply a living together and a struggling together of diverse groups under a habitual plan of coexistence; that the powers implied in sovereignty are not unitary but, on the contrary, are partitioned among a great diversity of leaders and group followers working out their selfish or unselfish interests under an accepted political plan.

In the main, that view is no doubt a correct one; it represents the sociological explanation of political society; but it goes too far in denying the existence

of sovereignty for the needs of legal theory. Both views can stand if the ground is properly divided. There is need of explanation of the actual human forces which affect the creation and application of law. This view is especially important for the sociologist. It is also important for the jurist when dealing with the past or future time dimensions; it explains Legal History and Historical Jurisprudence and it is necessary for enlightened proposals for legislation and as a basis of Functional Jurisprudence. But it is lacking in validity or application in the present time dimension. The body of hypotheses of what legal rules will be applied in given cases does not and hardly can take account, in an accurate way, of the existence of the ceaseless economic struggle that lies at the foundation of the legal establishment.

Lawyers need to work with the illusion of certainty in the law and a reasonable permanence in legal ideas. In fact, the whole institution of law is in a state of perpetual motion but that motion is no more regarded, for professional purposes, than is the orbital velocity of the earth by a housebuilder. Likewise, for the purposes of Formal Jurisprudence, the sociological point of view is destitute of value.

Formal Jurisprudence finds its materials in legal phenomena as such, and not in the conflicts of social groups. Moreover, without the idea of juridical ultimateness, the term 'law' would become meaningless.

Some of the corollaries of the idea of sovereignty have often presented questions of practical importance. Since one of the attributes of the State is juridical sovereignty, it follows that the State itself can not be subject to law. The State can not give law to itself. The idea of law, in the last resort,

involves the use of the State's physical force to make it effective. The State can not constrain itself. It is, therefore, quite impossible that the State could commit a crime, or commit a tort, or commit a breach of contract, or enter into a contract with a private person, or, in any proper sense, be a party to a law-suit at the instance of one of its subjects. No doubt, the State should keep its promises with its subjects and make reparation of harms inflicted by it on them, but that is quite another matter than the impossible task of making the sovereign submit to the law created by it. The unpopularity of this exposition of an incontrovertible proposition of elementary logic, often has arisen from the failure to distinguish between the State (which is a pure concept and an inescapable one for the starting point of all legal theory) and the Government (the agencies through which the State functions). If kings and emperors have ever been identified with the State, such identification could only have arisen out of theoretical error of the nature of the State in a period of juristic immaturity. The officers of government are not sovereigns and can enter into legal relations with private persons on the same basis as other private persons, except as exempted by law. In some countries, as for example, France, the relations of private persons to officers of the government are governed by rules which are applied only in so-called Administrative tribunals. In our law, while there is an important field of Administrative law, the officers of government may be impleaded in the regular courts.

At this point, we may briefly notice a closely related view which does not touch the problem of sovereignty but which involves a widespread error of the nature of law, which has the same explanation.

One of the greatest jurists known in the whole range of the Anglo-American system, Justice Holmes, has said that "the life of the law has not been logic but experience." This saying has been very extensively quoted, but we venture to believe that the learned author has been quite generally misunderstood. It is a very sententious statement and a correct one, but it involves an ambiguity which easily leads to error. Two things here need to be separated: (i) the making of law directly by the legislature or indirectly by the courts; (ii) the application of given rules to concrete cases. In making law, experience, no doubt, plays a greater part than logic, since there is as yet no developed logic of human group reactions; but, in the application of law, experience has no function and logic must govern. The lawyer in attempting to predict the applications of law in given cases, does not search his experience but attempts to deal with law as a rational whole on a logical basis. Certainly it would be unfortunate if the view were officially entertained that each man's private experience or his present reactions to that experience are more important in the solution of legal problems than a reasoned deduction of the rules which have already been tested by experience. The misapprehension, perhaps, is only a verbal menace, since the slightest consideration of the methods used by lawyers and judges clearly shows that they rely chiefly not upon experience but upon the products of legal reasoning.

Theoretical Jurisprudence also treats the nature of law and the sources of law, topics which will be considered at another point.

§ 12. Future Time. There is no generally accepted term for the structural side of legal science which looks to future time. The term Functional

Jurisprudence has gained some currency. Another term that might be used here is Science of Legislation but we shall employ the term, Constructive Jurisprudence by preference.

The chief object of Constructive Jurisprudence is to investigate legal and social phenomena in order to discover how desirable social ends may best be achieved. Constructive Jurisprudence is less concerned with the technical and analytical operation of legal rules and the applications of law, than with the actual social effects of these rules and applications. Constructive Jurisprudence has had much less development than any other field of legal science. Few studies have been made or attempted in this field. It is somewhat startling to realize how very little is known in an accurate and comprehensive way of the social operation of our legal establishment when the whole object of creating any legal rule is to produce certain anticipated results. This method of making legal rules is comparable to making a scientific experiment without taking the trouble to discover the result of it.

Scientific rule making requires two steps: (i) careful investigation of the experience already available as a basis of calculation of what results may be expected; (ii) systematic study of the actual results achieved. In practice, neither of these steps is taken, and new legal ideas are put afloat on a boundless ocean of social complexities without further thought of how, or where, they will reach a port. There is much reason to believe that the law of the law-books, in gross and in detail, varies widely from the legal life of the people.

At this point, is encountered a problem of legal philosophy and legislation. Assuming that this separation exists, is it necessarily an evil? There is,

on one hand, the living law accepted by the people in their hand to hand dealings. In these varied transactions, except where the law itself has prescribed forms, there is never any thought of the Applied law. Life is lived on a basis of a kind of self-created Natural law which is very remote from technical law. The law that is applied is an abnormal law. It always involves a disturbed condition which must be put in order. The contrast, normal and abnormal law, may be likened to a condition of health and a condition of disease. A pathological condition requires medicines, or surgery, or both, in order that a condition of health may again be restored. This contrast of natural and pathological law may perhaps in some measure account for the indifference of lawyers to what is the result of any particular application of law, since it does not affect the normal life of the people; but the same contrast fails for large scale transactions, and transactions concerning money credits, land, marriage, inheritance, and, in a word, all important economic and social dealings. Here the law may have a profound effect, at least on the form of legal transactions.

Constructive Jurisprudence is still so new that it has hardly yet developed a technique, but it is probable that one of its most reliable methods will be found to be the statistical method. The statistical information necessary for a scientific method of legislation must be sought in proper cases, not only in the law, but also in the life, practices, and customs of the people. The problem of law-making and law enforcement has been described as one of social engineering. The comparison is an apt one. There are certain ends to be attained, and careful calculations must be made to reach that end. An intelligent board of directors does not vote the expendi-

ture of money without a thorough preliminary survey. All legislation, even on unimportant subjects, has a vast tangency. Millions of persons normally are or may be affected directly or indirectly. In the modern State, no legislation is unimportant, and yet this important function is treated as if any person who happens to be elected to a law-making body, no matter what his previous experience or inexperience, is competent to deal expertly with institutions of great historical antiquity and often of much technical difficulty. Under such conditions, it is only the continuity of tradition preserved by professional judges under fictitious and judge-made safeguards, that prevents the democratically organized legislature from making a technical wreck of the law.

One of the most important of these safeguards is the judge-made rule that statutes are presumed to be declaratory of the common law and that statutes not declaratory of the common law are strictly construed. There are, no doubt, many defects in the legal establishment, but the greatest defect of all is found in the machinery, personnel, and methods of statute law.

Constructive Jurisprudence has two aspects: (i) the engineering problem of calculating the social effects of a proposed rule; (ii) the technical problem of stating the legislative proposal in such terms as will equate with the object sought without disturbing other parts of the legal structure, and, also, in terms that can technically be applied without difficulty. The first is a problem of substance; the second is a problem of form. The Statute of Frauds is a classic illustration of the need of scientific draftsmanship. That there may be a science of legislative statement has been as little appreciated as the need of expert talent in proposing changes in the substance of the

law. In view of what has been suggested, it is not strange that the prevailing juristic theory looks upon all legislation as a kind of raw material of law which first must be refined by judicial processes before it is ready for application.

B. RECAPITULATION

§ 13. **Historical Jurisprudence.** Historical Jurisprudence is the science which attempts to formulate the uniformities of action in the growth of law. As a science, it is based on two premises: (i) a general similarity in the nature of all human beings, taken in the mass, in their reactions to legal phenomena. Law is a by-product of human wants. The law will shape itself in some form to satisfy these wants. When, or if, or under what conditions a group want will historically appear can not be predicted, nor can the precise form of the legal satisfaction be stated as a matter of rule. This is due, no doubt, in part, to the fact that we do not yet know enough about group psychology for the purpose of such social forecasting, and it also, in large part, is due to the fact that imitation may have a strong influence in changing the course of a people's institutions. Sometimes imitations may have the effect not simply of reception of a foreign idea or institution but it may produce a catalytic change which transforms the entire moral and economic life of a people. Acceptance of these limitations, however, still leaves a very large field in which certain uniformities may be stated with scientific assurance. These uniformities are of two kinds: (a) positive; (b) negative. An illustration of a positive uniformity is the fact that when a legal rule is created to meet a given concrete situation, it will become diffused and eventually

will embrace all comparable situations unless the creative force which first called the rule into existence gives way, when the process of diffusion will eventually cease. A negative uniformity may be illustrated by the fact that a legal satisfaction is always subsequent in time to an economic want.

(ii) The second-fundamental premise of Historical Jurisprudence is the proposition that group phenomena are the reactions of an inert, non-psyche, non-spontaneous mass or substance which, under given conditions, may be expected to exhibit a permanence of attributes in the same manner as masses of homogeneous matter. The only important difference is that each human group differs from every other human group, but yet these differences go to explain only the motility of the mass and do not affect the order of progression of legal ideas. The effect of contingency here is no greater and no less than in the field of physics or chemistry. The uniformities discovered by science are actual uniformities only under ideal given conditions. Another difference is that less is known about the effect of variations in Historical Jurisprudence than in dealing with the physical sciences, and these variations also are probably more complex in Historical Jurisprudence than in the physical sciences.

Briefly characterized, Historical Jurisprudence is the science of legal history.

§ 14. Formal Jurisprudence. Positive law has a certain formal structure comparable to the skeletal structure of mammals. These osseous tissues are the levers with which the living organism executes the physical motions necessary for the satisfaction of the needs of life. Just as the higher forms of animal life are impossible without this mechanical

system of levers, so also a developed system of law is impossible without a formal structure of basic concepts. In rudimentary or developing systems of law these formal structures themselves are rudimentary. Therefore, just as there may be a science of comparative anatomy, so also there is or may be a comparative science of Formal Jurisprudence.

The law reduces to a few ultimate ideas,—State, Sovereignty, Law, Jural Relationship, Personateness, Facts, and Things. Each of these ideas is generic and presents many different species and subspecies. No legal phenomenon, however simple or complex, is or can be lacking in these ultimate elements. From these elements, the whole structure of the law can be formally organized. Formal Jurisprudence is not concerned, at least is not concerned primarily, with legal rules. It can not say that a given legal rule is just or expedient or workable, or is unjust, inexpedient, or unworkable. It has to do with the structure of the law and not with its content; it deals with form and not with substance. But the matter of form is one of such consequence, that Formal Jurisprudence may often be of great importance in dealing with substantial problems of justice, in pointing out the correct method of approach.

Law, in a developed State, ideally becomes or tends to become an organic unity. The great mass of rules which are the substantial content of a system of law arrange themselves in an orderly way, so that proceeding from the basis of ultimate ideas, certain formal methods are regularly employed which lead ideally to a consistent and harmonious body of legal rules and legal doctrines. The test of this harmony, for logical purposes, rests not on the concrete result of the application of law, but rather in the regular-

ity of use of coördinated methods of reaching legal solutions. In essence, all this reduces to a matter of form, and, from that point of view, Formal Jurisprudence may be regarded as a necessary professional working tool. That Formal Jurisprudence has not become a recognized professional instrument for the solution of legal problems is due to the fact that it has been recognized as a science for hardly a hundred years, and, as such, has had much less development than its importance deserves, and to the companion fact that the profession of law grew up in an apprentice tradition from which it has not yet emerged.

Formal Jurisprudence is not the study of elementary law as that term is commonly understood. It is the formal science of the ultimate elements of the law. It has two conventional divisions: (i) Theoretical Jurisprudence and (ii) Analytical Jurisprudence. Theoretical Jurisprudence deals usually with the elements, State, Sovereignty, and Law, while Analytical Jurisprudence treats the remaining elements, Jural Relationship, Personateness, Facts, and Things.

§ 15. Constructive Jurisprudence. The object of Constructive Jurisprudence is to be able to state the social effects of law and to be able to achieve desired social effects by scientific legislative methods. For this purpose, existing rules and institutions are investigated and the effects produced on social practices are noted as a basis of generalizations concerning the probable efficacy of legislation. It is the scientific counterpart of legislation in the practical sense. Legislatures can not make such studies on their own account, and must proceed on a basis of common sense and intuition. It is a matter of gen-

eral knowledge that a large part of legislation fails, not because of the curatorship of the courts which powerfully controls the effects of legislation, but because common sense and intuition often fail in calculating the reactions that follow law-making. One effect is sought, and another may be attained. One evil may be combated and a greater evil may spring up. It is too often assumed that a given evil can be cured by legislation, when, perchance, it is not remediable by any legal device. In our law, there is not, as in Continental law, a theory of desuetude of statutes but yet in practical effect much legislation falls into disuse. There is a very great need of a scientific attitude toward the whole subject of enacted law in our system in all directions—the political methods of initiating legislation, the form of legislation, and the substance of legislation. Progress in our law will to a large degree be measured by progress in the development of Constructive Jurisprudence.

Constructive Jurisprudence has two branches: (i) the formal science of legislative draftsmanship. This science takes a large part of its groundwork from Formal Jurisprudence. Due to reasons already suggested, this science is still entirely rudimentary and nearly everything yet remains to develop it. Even from the standpoint of the art of orderly arrangement, the materials of legislation in nearly all the separate States are in a confused condition making it often very difficult to collate the relevant statutory material on legal problems. In most States, this unsatisfactory situation is periodically relieved by a general revision of the statutory law—a method that is unsound for various reasons, as a permanent solution of the problem.

(ii) The second branch of Constructive Jurisprudence is concerned with the substantive science of

legislation. This already has been sufficiently described.

In a word, Constructive Jurisprudence is the science of enactment of law.

§ 16. Philosophy of Law. The above classification does not entirely exhaust the division of legal science; there is yet philosophy of law. The structural divisions of legal science, Historical Jurisprudence, Formal Jurisprudence, and Constructive Jurisprudence are more fundamental than the data, respectively, of Legal History, Positive Law, and Practical Legislation. Philosophy of Law lies at the base of all the above divisions of legal science. Philosophy of law is, in turn, simply one of the special divisions of the study called Philosophy. Philosophy deals with various difficult problems which are not encountered in legal science. For example, the problems of epistemology, the inquiries into the validity of knowledge, are special problems of Philosophy with which neither a lawyer nor a legal philosopher will need to deal directly. Again, other problems of Philosophy are necessarily dealt with by the law. For example, the problem of free will is implicated necessarily in the legal problem of punishment. The law proceeds upon the view that the will is free although it is far from certain that this view is correct. At any rate, philosophers do not dogmatically assert the proposition and the problem probably is insoluble.

One of the aims of Philosophy is to give a systematic account of reality and its meaning. Law is part of this reality and at this point falls within the scope of Philosophy. It is an interesting fact to note that from the earliest times, philosophers have been interested not alone in the problems of metaphysics but many of them have also attempted to give an

account of the meaning and purposes of law. Among those who are known for their writings on legal institutions are Plato, Aristotle, Thomas Aquinas, Kant, Hegel, Fichte, Hobbes, Locke, Spencer; and there are many others in ancient and in modern times. Some of these writings have worked important influences in the law and if there were no better reason than that, legal philosophy would still be worthy of attention.

There are two very important points of contact between the problems of Philosophy and the problems of Philosophy of Law. The first of these is the problem of Justice. What is justice? How far should the law attempt to attain justice? The ready answer that a layman would offer is that at least in the administration of justice, complete justice should be attained so far as human intelligence can understand it and human powers award it. The law, however, does not entirely accord with this apparently reasonable demand. Many legal rules operate in too inflexible a manner to do justice in individual cases. Such rules may be just for the average case but may fail to do justice in this or that particular case. For example, where two witnesses are required for the validity of a will, and where the form of execution is signing by the testator in the presence of the witnesses and signing by the witnesses in the presence of the testator, the testator may have signed and one of the witnesses may have signed and before the second witness has had an opportunity to sign, the testator may suddenly die. In such case, the will is invalid because the formality of the rule has not been observed. Where the rule is one of statute, as in the example given, the courts have no authority to mitigate the rule. In the early history of law, precedent (case law), in all systems of law, is more in-

flexible than in the maturity of law. As a result of this inflexibility, there grew up in our law, operating alongside the Common law, the system of Equity which sought to relieve situations where there was no remedy or no adequate remedy at law, and where fraud, accident, or mistake entered into the case, so that it would be unjust and inequitable to deny relief.

The reformatory power of equity has now practically ceased in our law, and the system of equity no longer differs from the Common law system in point of flexibility or adaptability to create special rules for cases where the law has become settled. We say there is no difference today in the two systems in respect of flexibility, but due to the enormous accumulation of case material, the tendency is toward a growing flexibility in both systems, since the field, once extensive, of what was considered as settled is actually now becoming narrower, in consequence of which the law is approaching the stage of discretion from which it started. It is not highly unusual to encounter in the reports instances where judges take occasion to deplore the necessity of applying a rule which they regard as working injustice in the case to be decided. Such a situation always will appear to a layman not different from the case where a surgeon takes a pint of blood from a patient because the rule is to proceed that way, although he knows it will produce death. But there is a difference. Patients do not ask a surgeon to apply rules but to use skill and judgment. Litigants, on the other hand, are more interested in an application of what they believe are the rules than in the Solomonic judgment of the judge. In a word, litigants seek law and not justice. The layman's point is doubtless sound, but it encounters the hard obstacle of a

deep prejudice in litigation against intrusting judges with power to modify settled rules. There are various other practical reasons which support, if they do not justify the prevailing practice.

The law, considered as a whole, has always put more emphasis on order, certainty, and regularity than on the elusive idea of justice. It has been thought more desirable to have an admittedly unjust, certain rule, than a debatably just, uncertain rule. But in many important instances rules of law may have the qualities of certainty; they may promote order; and they may have a regular and accepted application; and yet they may involve questions of substantial justice in such a way as not to be indifferent in individual cases. For example there are various rules of damages in negligence. There is the rule that if the plaintiff is guilty of any negligence he can not recover, no matter how great has been the negligence of the defendant. This is the prevailing Common law rule. Then, there is the rule of admiralty, especially applicable where there is a loss on both sides, of apportionment. Again, there is the rule which measures not the loss but the negligence. Finally, there is the rule of Industrial accident law that, notwithstanding negligence of the person harmed, there may be recovery of compensation. If any one of these rules can be said to be a just rule, it is not easy to see that the other rules can be just rules.

There are two different ways of looking at questions of this kind. First, we may consider the individual confronted by another individual and attempt to work a just solution from a consideration of all the facts and circumstances surrounding these two individuals without much, if any, inquiry as to the social reaction. Secondly, we may look to the social

reaction without regard to the particular effects on the individuals. The first represents the individualistic concept of justice; the second the socialist concept. There may be an intermediate method of regarding the individual and also regarding society with the emphasis in one direction or the other.

It is clear that our law has been and remains chiefly based on an individualist program and it is also apparent that there is a strong current in the socialist direction. The illustration given exhibits one of the familiar ones of the great number of problems where the administration of law needs to be founded on a comprehensive and systematic view of social facts.

The second important point of contact is met in legislation. The problem however is the same problem—the problem of justice which is the crux of legal philosophy. When a new rule is made, it has some object or end. The justification of this object can be based only on a rational view of the meaning of society. The science of Constructive Jurisprudence has the mission of showing how a given result can be reached with the least friction, but philosophy alone can answer the question whether a given end sought is rationally consistent in a rational system of ends.

It may, doubtless, be true that legislation, in greater or less part, is inspired by group struggles to attain their wishes and that in this struggle for legislation, philosophic justifications play a very small part. But, when legislation is disinterested, it needs to be based on rational purpose and this rational purpose is one that coördinates with other rational ends in a systematic unity of rational purposes. It is probably demonstrable that in spite of the competition of classes to serve their own eco-

nomie wants, there is a pervading influence of rationality which, in longer or shorter intervals of time, succeeds in rectifying the purely ingressive expressions of will of individuals and of groups. The self-serving impulse is a permanent one, but it lacks the consistency and unity of design of reasoned justification. It is a strong force quickly exhausted and is variable in expression, while a rational system of acting, although feeble in power to stand against interests emotionally felt and energetically asserted, remains always permanently in the background of human effort and succeeds step by step in standardizing the struggle for power and in elevating the level of human institutions. Such, at any rate, appears to be the result of this opposition of asserted wants and rational justification in the long history of legal ideas. As a corollary of this movement, it probably also is demonstrable that the progressive force of rational purpose has been powerfully aided by the competition of self-regarding interests.

Legal philosophy begins first at the point where an attempt is made to give an explanation of what end is sought in the shaping of a new legal rule. If an end is sought for its own sake and without any relation to other facts of life, it is only a desire and is not a philosophy. There may be various stages and kinds of legal philosophy—at least in a wide meaning. In the strictest sense, legal philosophy must be wide enough to correlate all the facts of life in a systematic unity of ideas. In the wider sense, any reasoned justification or explanation of a legal rule or institution is also part of legal philosophy and from this point of view, philosophy of law is an indispensable part of legal science and of the art of law.

Schools of Legal Philosophy. It is possible to classify the schools of legal philosophy in various ways. They may be divided into two large groups: The Metaphysical and the Empirical. The difference between them is one of method and of approach. The Metaphysical schools relying chiefly on the power of reason to build categories of ideas by logical processes, seek to construct complete systems of reality in which legal systems find a place which harmonizes with the general structure of the system created. Hegel's system is one of the best illustrations of such a metaphysical construction. The Empirical schools relying chiefly on experience of the world, and, in law, the experience of legal history, seek to build up systems of hypotheses of complete unity. In both cases, the end sought is the same—a rational explanation of the world and especially of human purposes with a view of shaping legal rules and legal institutions in a consistent pattern of the whole.

Another classification is that of Unitary and Pluralistic schools of legal philosophy. The Unitary schools seek an explanation of reality, including the law, as a consistent, organic, and logically complete structure. The methods may be inductive or deductive. The Pluralistic schools either deny the existence of unity and logical coherence in reality or else put aside the effort to discover it as beyond human power. The methods here also differ. For example, a Pluralistic school may proceed from the premiss of inviolability of human life and build up a system of rights on that basis. Again the Pragmatists may recognize only the actual forces which dominate in the building of law and seek to build a system which permits these forces free play in an orderly competition.

Another classification of the schools of legal philosophy which in this present era has some currency, due to the dominant trends of philosophic thought, is the Neo-Hegelian school, the Neo-Kantian school, and the Positivist school. Each of these schools has many varieties.

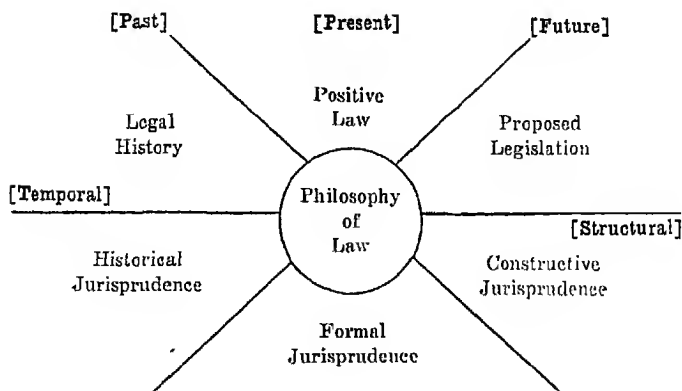
Legal philosophy may attempt to give a rational explanation of law as it actually is and has been, or it may attempt to state what the law should be. The first object is based chiefly on Historical Jurisprudence and it becomes a philosophy of legal history. The second object is sought chiefly by the schools of Natural law in its various forms. This difference in the objects sought also makes possible another somewhat complex classification.

In Anglo-American law there have been two quite opposed influences which lived side by side, especially in America. First there is a profound belief in an ultimate basis of justice; a belief in an enduring and unchangeable system of ideas which is of higher validity than Positive law. Secondly, there has been a habit of proceeding experimentally without much, if any, effort to define ends. It is rare, however, to find any reliance placed on any general ideas of a fixed system of justice, and while the belief in such ideas has tremendous importance in the administration of the legal establishment, yet it rarely becomes articulate beyond a casual appeal to Right the value of which no one takes the trouble to investigate. In a word, our law rhetorically moves on a road of Natural law, but, in practice, it moves on the wheels of expediency. The fact that legal philosophy, in an accurate and scientific sense, is wanting in both of these dominant influences, strongly suggests the need of deeper penetration into the subject matter of these fugitive ideas. Legal philosophy probably can

not attain the level of becoming a regulative discipline; it may not be possible to construct a system which adequately explains the past and points out the mathematical ideal line of the future; but with so much conceded, it may still have a very important function as a critical apparatus to test the validity of our general ideas. It may serve a useful purpose in accepting the facts of the sciences and in preventing the development of any legal philosophy which can not withstand the test of criticism based on these facts. A critical legal philosophy, if not also a constructive legal philosophy, is a necessary, special, and fundamental division of legal science.

C. DIAGRAM OF THE FIELDS OF LEGAL SCIENCE

Without attributing to one department of legal science a greater importance than to another, the subject matter of this science may be illustrated by the following diagram.



§ 17. **Terminology.** Various terms have been used in the foregoing discussion which have a somewhat special meaning. An inspection of some of these terms and a few others not used above which occur frequently in law and juristic writing will now be desirable.

Equity. This term has various uses. Its principal use is to denote the institutions combined into a system which explain the activities of courts of chancery as distinguished from courts of Law. Equity may also mean fairness or reason: thus, certain conduct is or is not equitable (fair); the equity (reason) of a rule.

Institution. Law is built up around certain interests such as life, liberty, corporal integrity, use of goods and lands, and performance of acts due from others. Each one of these interests becomes the center of an extensive accumulation of rules which define their scope, their points of infringement, and the redress obtainable for such infringement. The sum of these rules with the interest as the focal point is an institution. All of these interests have many important divisions which are based on some special aspect of the generic interest. These special interests in turn become the focal points of special accumulations of rules. Using a figure of speech, the law is a complex planetary system where there are systems within systems. Following the analogy, there is a general concordance of motion in the system as a whole, but each special system and subsystem tends to develop in detail rules peculiar to itself. Legal values become relative. For example, the same mass of iron will have different relative weights on different planets; the same interest has differing valuations in differing situations.

As the law becomes more extensive, a decentralizing process sets in which progressively widens the

breach between these various systems and sub-systems. Due to historical accident, misapprehension of older rules, attempts to find new distinctions to fit particular instances, and especially the desire to do justice in each case, new rules arise in each independent system, and thus, while there is no appearance of collision of rules, the various systems of institutions are constantly being modified at all points. It can not be doubted that where a system of law shows unmistakable signs of disintegration, as does our own system, and where this process is not arrested, it will eventually reach a stage where the law becomes purely discretionary in practice, subject only to a complex background of legal tradition which saves any legal community with such a background from falling into a condition where legal rights are subject only to the personal caprice of the judge. This tradition, it should be noted, is rarely explicit; it becomes an unformulated body of general ideas never or rarely stated in the shape of rules but having a force superior to rules themselves.

Jurisprudence. This term has several meanings. It may mean chiefly the whole or some part of the whole body of law. Thus Anglo-American Jurisprudence has the same meaning as Anglo-American law. Sometimes it means the course of decision of a particular court as when one speaks of the jurisprudence of the Supreme Court of the United States. When a particular sub-system of law is in question the term is used sometimes to identify it; thus, Equity Jurisprudence, medical jurisprudence, mining jurisprudence. The term Jurisprudence was adopted into our professional language from France and Spain, where, as in other Latin countries, the term is applied to case law strictly and not to other sources. Another use of the term which in recent

times has gained some support is to identify it with the science of law as distinguished from the art or application of law. That is the usage adopted here. In that sense, jurisprudence embraces the three structural divisions of Historical, Formal, and Constructive Jurisprudence and does not embrace any of the temporal divisions of the subject matter of law.

There are also certain other companion terms which are widely used, having in part the same etymological root.

Jural, Juristic, Juridical. One of the outstanding difficulties in making a scientific or useful apportionment of these and contrasted terms is that the appeal to etymology is not conclusive. The term 'jurisprudence' was used by Roman lawyers to designate skill in the art of law (*jurisprudentes, juris periti*). Accordingly the resort to etymology would seem to justify a wider application of the term 'jurisprudence' than the one used here; but against that is the fact that a science of law in the strict sense was not known to Roman lawyers, and, whatever else may be said on the matter, it would be useful to distinguish Law and Jurisprudence in the same way that art and science are contrasted.

Jural. Having in mind the scientific connotation suggested, *jural* denotes an abstract idea of law. Thus a specific legal relation when considered as a type (i. e. abstractly) is a jural relation. All specific legal relations, therefore, are cast in the mold of jural relations which embrace all the essential attributes of all such legal relations. Again, the contract duty of John Smith is a specific (unique) duty but the idea of legal duty itself as a scientific concept is a jural idea since it is demonstrable that the law

uses it. Again, when two persons engage in an agreement of sale, lease, mortgage, or contract, or other two-sided bargain, this is called a legal transaction; but when the same agreement is considered as a type which sums up all the essential attributes of an unlimited number of specific agreements which may be cast in the same mold, it is called a jural transaction. Commonly the term used by juristic writers for 'jural' transaction is 'juristic' transaction but this usage appears to be an inconvenient translation of 'Rechtsgeschäft.'

Juristic. While the term 'jural' has an abstract but yet authoritarian meaning, the term *juristic* lacks that authoritarian quality. For example, imprisonment, fine, damages, are specific sanctions following breaches of duty and they point out another idea called Liability. Liability is a jural concept, since it may clearly be demonstrated, but if the idea of liability were still to be demonstrated and generally accepted, it would be only a juristic concept but once accepted it would become a jural idea. The term 'juristic' is especially useful to indicate the researches, theories, hypotheses, and methods of jurists; that is to say, of those interested as specialists in the structural divisions of the subject matter of law.

Juridical. This term is generally used in an uncertain way. Usually the precise meaning is doubtful. That objection should be overcome in science if possible. In literature, there are many hundreds of words which serve the function of creating an emotional field of discourse. This is especially true in poetry. Everything depends on the form of the word, and little depends on any definitive point of

conceptual meaning. This will not do in the domain of science where ideas must be precise, and free, in the first instance, from emotional flavor.

The term 'juridical' has an advantage over 'jural' and 'juristic' in having an etymological explanation for all of its parts. Literally it means 'speaking of law' (dicere + jus) or 'pointing out of law' (dicare + jus). On that basis, the term may very conveniently be restricted to the work of courts of law and the work of legislatures in declaring law. A decision of a judge is a juridical fact. It is better to say a 'juridical' fact than a 'judicial' fact because judgment is common to all conscious acts, while juridicality is a special quality of a special type of conscious acts—the formal judgment of a court or formal declaration of law of a legislature. The system of facts embodied in precedents is Judiciary law in contrast to the Enacted law of a legislature. There is also a usage which limits the term 'juridical' to legal phenomena occurring in the judicial process of the courts. There is also a usage which applies the term 'juridical' to all legal phenomena in contrast with other phenomena. For example 'juridical' law is contrasted with physical or natural law.

Legal, Legic. We have seen above that the terms 'jural' and 'juristic' both fall in the group which treats legal ideas in the abstract. 'Jural' has an authoritarian connotation and 'juristic' lacks the quality of political authority. Jural ideas are the ideas of the law considered in an abstract sense. Juristic ideas are the scientific ideas of jurists. Since terms so nearly alike in form should not be used as synonyms, it is desirable to give them different functions.

The terms 'legal' and 'legic' present a similar problem.

Legal has various meanings. It means lawful (not forbidden); lawful and effective (e. g. a valid contract); unlawful and effective (e. g. a tort act is a legal fact); pertaining to law (e. g. a legal document); a relation created by law (e. g. legal disability); a remedy recognized by a court of law in contrast to a court of equity. There are also various other more special meanings. It is a very dromedary of words, and one does not read far into the literature of law before he encounters difficulty in finding the exact shade of meaning, except as that meaning may be derived from the context. This is an obvious inconvenience, but it is an inconvenience affected by professional distaste for any attempt to find a remedy. To overcome it, or to minimize it, the wide variety of meanings suggested must be cut down and at least one slight orthographic coinage must be tolerated.

Following the distinction already made for 'jural' and 'juristic,' *legal* may be confined to an authoritarian function and the term 'legic' may be used for the non-authoritarian function. For the rest, there are sufficient other terms to indicate the remaining senses where the term 'legal' now carries the burden.

Some examples should now be given running through the gamut of terms which pertain to the law.

A judge is a law officer (rather than a legal officer); a statute book is a law book (rather than a legal book); a valid contract act is a lawful act (and not primarily a legal act); a tort act is an unlawful act (and not a legal act except in a juristic sense);

the decision of a judge if valid is a legal act; the levy of an execution by an officer of law is a legal act; a copartnership of lawyers is a legic firm (and not a law firm or a legal firm); a private treatise about law is a legic book (and not a law book or a legal book); a blank form used in a transaction in law is a legic blank (and not a legal blank or a law blank); an act which has no legal consequences is a licit act; a corporation is a legal entity; immunity is a legal concept; assumpsit is an action at law; the science of law is a legic science. The connotation may, sometimes, require other variations. Thus, a tort act is a legal act in that it has legal consequences, but in contrast with lawful act, a tort act is an unlawful act.

Principles. This term has a bewildering variety of uses. Frequently it is employed as a term of mere rhetoric without any definite meaning intended or suggested. That so many important law terms are used in a loose sense is due to the fact, that persuasion is a considerable factor in the application of law. For this purpose, it is common in both oral and written discourse intended to move the minds of triers of facts, to resort to the language of imagery. Many juristic terms serve this purpose. For the professional lawyer, the habit of employing figurative language in appeals to the emotions of the unlearned is unconsciously carried over into more seriously conceived addresses and here the terms 'jurisprudence,' 'juristic,' 'juridical,' 'institutions' and 'principles' are favorites which render poetic service for words of less pretension or conceal the absence of clear thought.

The term 'principle' already is used in so many different senses that it may be doubted whether it

any longer can serve any useful purpose in professional terminology.

Among the meanings which can be isolated are the following: (1) the fountain of original precedent (discretion in contrast to rule); (2) a generalization of rules (e. g. *volenti non fit injuria*); (3) the purpose of a legal rule (end in contrast to means); (4) the reason for a rule (a situation in contrast to a purpose); (5) an immutable proposition or one so regarded ("Men are born, and always continue, free and equal in respect of their rights"); (6) an operative technical method of attaining a legal solution (e. g. trust, bailment, contract, etc.); (7) a rule derived by induction from the sources (chiefly precedent); (8) the inarticulate or only vaguely definable background of legal institutions (e. g. Christian civilization, Due process, reasonable care, good faith, *boni mores*).

Science. In the widest sense, a body of facts known or knowable may be a science. In a less wide meaning, science is systematized knowledge. In a yet more restricted sense, it is systematized knowledge of facts which exhibit analogies and identities showing an inherent organization. This last sense is probably the most liberal that would today be accepted; for the meaning of the term 'science' has grown more definite with the accumulation and organization of facts. This last sense, remains, however, still relatively a wide one; it includes knowledge of a system of law even in its practical aspects. Therefore, organized knowledge of the facts of legal history, or of the institutions of positive law, or of the technical features of law-making is *legic science*.

In a still more restricted sense, *legic science* would not extend beyond the fields of Historical Jurispru-

dence, Formal Jurisprudence, and Constructive Jurisprudence. It probably would be convenient to fix the line of division at that point. From that point of view the temporal divisions of law would be constructed of two elements—History and Art, while all the structural divisions of law would be fields of science. Not only is such a division convenient for a proper distribution of the functions of history, art, and science, but it also is justified on analogical grounds. No extent of systematization of facts of concrete animals, plants, physical substances, or chemical compounds would be regarded as science. Only the abstractions formulated into organized hypotheses, theories, and laws under the names zoölogy, botany, physics, and chemistry, are regarded as the proper subject matter of science regardless of their concrete manifestation in particular cases. So, also, in the law, particular legal rules or institutions, past or present pertain to history and art, but they are not science. Science of law, in the sense pointed out, is limited to the hypotheses, theories, and laws which account for the existence of the particular phenomena of law.

The field of science, whether of law or of other facts, relates to the uniformities, analogies, and explanations of phenomena which are subject to repeated observation by experiment or otherwise. The uniformities governing the growth of law, for example, can not be demonstrated by controlled experiment of a single investigator but yet the data of legal history are already so copious that an examination of these sources accomplishes all that would be possible by direct experiment. The State, however, could undertake controlled experiments in the efficacy of legislation.

It remains yet to account for legic philosophy. Legic philosophy is neither history, art, nor science. It is simply legic philosophy, just as pure mathematics, metaphysics, and logic fall outside the limits of history, art, and science, constituting the highest generalizations of scientific thought, or being the ultimate forms or structure of human thought. What has been said here of the divisions of the subject matter of law into the departments of history, art, science, and philosophy, does not imply, of course, that these fields, as they are treated in practice, present always these sharply defined functions. They are in substance interconnected fields (as the diagram above shows) radiating out from a common center of legic philosophy. The distinguishing features are fact for history, skill for art, regularity for science, and ultimateness of explanation for philosophy.

System. A system of law is the sum total of its legal institutions.

§ 18. Wigmore's Classification of the Science of Law. Dean Wigmore has created a new classification of the materials of legal science based on "the ways in which we conceive of law as an operative fact in its relations to the world." The terminology and classification are as follows:

Nomology is the science of law as a whole. Nomology is classified according to the different activities of thought which deal with the fact of law as follows:

(1) *Nomoscopy* deals with the ascertainment of facts which bear on the regulation of human conduct.

(2) *Nomosophy* deals with the standards of justification of legal rules.

(3) *Nomodidactics* deals with the teaching of the facts of legal science.

(4) *Nomopractices* deals with the making and enforcing of legal rules.

Each of the above four divisions of nomology has or may have various subdivisions.

Nomoscopy has three branches:

(a) *Nomostatics* deals with the actual law of a given moment by a study of the sources—statutes, decisions, customs, etc.

(b) *Nomogenetics* deals with the history and development of legal rules.

(c) *Nomophysics* deals with the relations between law and other sciences.

Nomosophy has three branches:

(a) *Nomocritics* deals with the justification of legal rules as tested by logic.

(b) *Nomothetics* deals with the justification of legal rules as tested by ethic.

(c) *Nomopolitics* deals with the justification of legal rules as tested by economics.

Nomodidactics has not been further subdivided, since there are already satisfactory terms in use to indicate the various methods of teaching law: the lecture method; the text-book method; the case method.

Nomopractices has three branches:

(a) *Nomodikastics* deals with the application of law by lawyers in giving counsel and by judges in deciding cases.

(b) *Nomopoietics* deals with the law-making function.

(c) *Nomodrastrics* deals with the executive function of the application of legal rules, as when a sheriff makes a levy under a fieri facias.

These various ways of approach to the materials of law may be combined in the following diagram.

NOMOLOGY.

I	II	III	IV
NOMOSCOPY (Facts ascer- tained)	NOMOSOPHY (Justification)	NOMODIDACTICS (Teaching)	NOMOPRACTICS (Law-making. Application. Enforcement)
(1) <i>Nomo- statics</i> (actual law)	(1) <i>Nomo- critics</i> (logic)		(1) <i>Nomo- dikastios</i> (judicial func- tion)
(2) <i>Nomo- genetics</i> (history)	(2) <i>Nomo- thetics</i> (ethic)		(2) <i>Nomo- poietics</i> (legislation)
(3) <i>Nomo- physics</i> (other sciences)	(3) <i>Nomo- politics</i> (economics)		(3) <i>Nomo- drastics</i> (execution)

It may be here suggested that there is no conflict between Dean Wigmore's classification and the one earlier given. The two classifications are complementary. One deals primarily with the subject matter of legal science; the other deals primarily with the methods of treating this subject matter.

CHAPTER II

STATE AND SOVEREIGNTY

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| § 19. The State. | § 25. Powers of the State. |
| § 20. State Distinguished from
Other Organizations. | § 26. The Three Powers. |
| § 21. State Interests. | § 27. Logical Separation of the
Three Powers. |
| § 22. External Forms of the
State. | § 28. Confusion of Powers. |
| § 23. Internal Forms of the
State. | § 29. Generalizations on the
Separation of Powers. |
| § 24. Recapitulation. | § 30. Classification of Powers. |
| | § 31. Summary. |

§ 19. **The State.** For the lawyer, the State is only a concept—the concept of sovereign jural personateness. For the sociologist, the State is a political organization of human beings or of human groups. Both views are correct, each for its own purpose. For juristic purposes, it is necessary to sum up all the phenomena of political society into one idea of ultimate authority, regardless of where the human center of force lies, which at any given moment makes this authority practically effective. This ultimate authority, it must be emphasized, is purely conceptual, but it is not artificial or fictional; it is a basic reality of jurisprudence. This concept of State personateness is a necessary one in order that there may be a stable and a coherent system under which legal relations may come into existence and be distributed. State personateness is, therefore, not merely an economy of thought but an unavoidable premiss for a workable system of law

functioning in an orderly and understandable way. If, instead of referring all ultimate authority to the conceptual source of the State, an effort were made to discover the actual center of human force and to fashion concrete legal relationships according to the will (if ascertainable) of that source of human power, the whole system of law as an orderly, understandable, and coherent structure would fall into a ruin. It has already been pointed out that the warring currents of human force which underlie the conceptual structure of the law, play their part in the making of law and in the growth of law, but in order that law may function in human society in an orderly way, i. e. in such a way that the members of society may act with reasonable assurance of the legal effects of acting, it is necessary to assume a workable stability in the institutions of law and such a degree of control over the human forces that underlie these institutions, that the standards of workable certainty in the legal effects of human acting may be preserved. The concept of State personateness therefore serves the purpose not only of an ascertainable source of jural power but it operates also as a governor or escapement upon the very forces which bring it into existence. In this aspect, State and law are a social hyperphenomenon.

One of the logical results of this conceptual sovereign personateness, is the division into *Sovereign*, *Government*, and *Subjects*. The sovereign (the State) is above the law and the government and subjects of the Sovereign are under the law. It is perfectly clear that there can be no juridical rights in a subject against the State. The State may and does in certain cases (e. g. in instances that fall within the form of a contract but not as a rule the form of

torts) allow suits to be commenced against it; but whatever may be the form of such suits whether petition to the government (not to be identified with the State), or a suit in a Court of claims, or suit in the ordinary courts, the fact is logically unassailable that the Sovereign is not submitting to a jural constraint. Such instances are spoken of as auto-limitations, but the term is somewhat misleading since the Sovereign can not jurally limit itself in favor of the subject. Any limitation on sovereignty, however slight, is an instantaneous, logical destruction of sovereignty. That the State should keep its promises to its subjects and should redress the unjustifiable harms that it works on its subjects, is another matter; that it can be compelled, in a jural sense, is impossible.

This conception of State personateness is a scientific development of modern times. In earlier centuries there was always a tendency to identify the State with the Emperor or King and there were then current such maxims as "*princeps legibus solutus est*" and "*nemo suo statuto ligatur.*" It was not then understood that there is a valid distinction between the State and the Government (the officers of the State). Officers of the State always had, and even today have, certain exemptions from law; but even if it ever was true that the head of a Government was entirely exempt from all legal constraint, the distinction would still remain. This confusion of two entirely distinct things has not yet disappeared in theoretical writings of our own time. Where the effort is made to subject the State itself (as distinguished from the Government) to its own laws, it is necessary to hypostatize a new jural sovereignty in an abstract idea of justice, to satisfy the logical need of jural ultimateness and authority.

There can be no serious practical objection ordinarily to that solution, and it has at least the advantage of giving the law an ethical character, but that solution is not historically justified, and, analytically, it can not be demonstrated or defended. The analytical reason briefly stated is that no technical construction can go farther than the necessity of it as determined by the actual course of legal phenomena. These phenomena do point to a concept of jural ultimateness or sovereignty as a necessary logical basis of law, but they go no farther and do not point to an abstraction of justice entirely outside of the legal establishment itself. The question, however, rarely is of importance in private law, but sometimes it becomes important in a practical way in the basic theories of public law and international law.

The phenomena of nature and of life are not presented to our minds in the form of definitions and classifications. Definitions and classifications are mental constructs which have the purpose of making these phenomena clear in our thinking and in making possible a communication of ideas. The State, in a material sense, is one of these phenomena of nature; it is not an artificial thing; it is not a creation of man. The State arose out of the gregarious nature of man and is a product of his instincts and needs. Stateness implies, in the widest sense, continuing organization of human beings whose conduct is regulated by ultimate resort to normally effective physical coercion without regular interference by other groups similarly organized. The irreducible positive elements are (1) a collection of human beings; (2) a continuing organization; (3) regulation of conduct; (4) ultimate physical coercion. There is one negative element; absence of regular interfer-

ence (supervision, or support) by any other group. For a description of the modern State and for the purposes of international law, other elements are added; the principal one being power over a fixed territory. States are also distinguished on the basis of internal and external sovereignty, and are classified in various ways according to the form of political organization.

It is necessary to distinguish, finally, the material and the conceptual aspects of the State. The material aspect is given by the fact of an organized human group regulating conduct by use of physical force without outside interference. The conceptual aspect is that which arises in the mind when the elements of the definition are satisfied. For the sociologist and the student of social forces, the State consists of a certain form of human organization. We have already shown that this view is a necessary one for an understanding of the legal establishment. But for the jurist, the State *never is constituted of human beings*; it is simply the *ultimate idea* of jural authority which arises from a certain kind of human organization. Legal science, in its technical aspect, can not go back of this conceptual postulate. In the first place, it is not necessary to go back to the human elements which underlie the concept, for the purpose of solving legal problems; and, in the second place, to attempt to go back of the concept of Stateness for the solution of legal problems, would tend to disintegrate the law, since the will of the group may conceivably, at a given moment, be contrary to the law of the State, and where the will of the group is not ascertainable (as would be the normal case) the judge would substitute his own view as the view of the group and thus legal solutions would depend always on a perpetual referendum

which never could be practically carried out, resulting in a Government of clamor and expediency.

This point may be illustrated and it deserves careful attention, if only for the reason that it is the misconception not only of the masses but often even of the learned. The Constitution of the United States commences: "We the people" etc. In the Tenth Amendment it is provided that powers not delegated to the United States nor prohibited to the several States are reserved to the respective States "or to the people." These provisions have given rise to a popular view that sovereignty resides in the people. No idea could be more fallacious. The people may be the cause of the creation of States or the cause of their destruction, but the people can not be the State itself, nor can the people have jural sovereignty. Let it be supposed, that the federal Constitution prohibits the manufacture and use of tobacco and let it be supposed that all the voters use tobacco in some form. Is the constitutional provision to be referred to the wishes of the people or to the declared will of the State? There can be but one technical answer, although under such a supposition as made, it is easy to see that the constitutional provision must fall into desuetude.

§ 20. State Distinguished from Other Organizations. The State is not the only aggregate that regulates human conduct. Social deportment in the matter of social attitudes, dress, speech, and acts, in the minutest degree, are standardized by social conventions; but, here, the standards are often group standards, each group having its own unwritten code of deportment. This field is one worthy of study since it furnishes material on a large scale exhibiting the method of developing conformity in human con-

duct. Standards of deportment are not physically coerced. The chief sanction of non-conformity to a rule of social deportment is purely negative—avoidance. It is easy to distinguish the State from other groups which standardize deportment. Law has its ultimate support in physical coercion; social courtesy can not be physically compelled by direct action without intruding on the field of law, since the law prohibits the use of physical force for such a purpose.

Another difference is that the fields of conduct of law and of social deportment are entirely different fields. Therefore, social groups, in the regulation of deportment, do not have all the essential characteristics of the State.

If, however, it could be conceived that social groups were organized to deal with violations of the code of deportment by use of physical force, and that the political state did not interfere in that field, we should have in the same territory and in the same social aggregate, two States and two Sovereigns. This phenomenon of dual control is not only thinkable but it is actually found operating on a large scale in the United States. The federal government is a State (and, therefore also, a Sovereign) in matters of federal law, and each of the federated States (Illinois, for example) is a State and Sovereign in matters of local law. There are two States and two Sovereigns in the same territory, governing the same persons.

There is here, however, one point of theoretical difficulty. Where the field of conduct is divided, questions will arise as to the precise determinations of the boundaries of division. These questions must be answered and if the ultimate power of decision and the ultimate power of physical coercion to make that decision effective are found on one side only,

then we must say either that all sovereignty is on that side, or that sovereignty of questions of collision, only, are on one side. The latter alternative is the preferable one, since sovereignty may exist for different purposes.

Morals and ethic also regulate conduct. Here the field includes all of the field of the political State and more, since there is no act of any kind that does not submit to an ethical valuation. Even a rule of the road which may appear to be perfectly neutral, since it must be one of various alternatives equally applicable to all persons, will, on closer inspection, be found to involve a choice of values. The greater number of all human beings are right-handed and the correct rule must not ignore this physiological fact. Other considerations of ethical value also may enter into the problem. The sanctions of morals are often more effective and more far-reaching than the sanctions of law. They operate quickly and drastically, often reaching the innocent with the guilty. But these sanctions rest on social disapproval, censure, and avoidance, and, as in the case of standards of deportment, do not have a support in physical coercion.

Religion, also, is an important field which regulates human conduct. In modern times, the force supporting religious conduct has become like that which supports moral conduct with the difference that divergences from religious standards are capable of reproof by organized methods reaching the delinquent as concretely as the sanctions of the political state, but stopping short of physical coercion, and substituting for that element the fear of supernatural punishment. In the Middle Ages, the Church was able to standardize conduct by resort to physical force, and then had all the attributes of the political

state. That, again, was an instance of two sovereignties coexisting in the same territory among the same people, with a divided authority. The sovereignty of questions of collisions of law lay with the Church, but, eventually, this sovereignty passed to the political State, and rapidly all political authority of the Church passed also into the power of the political State.

Where there is plural sovereignty in the same territorial domain, or only divided authority in two governments of the same sovereign, the sovereignty of determining the legal effect of collisions of law will tend to cut down the jural authority of the competing sovereignty. The effect of this tendency is clearly seen in the United States in the progressive centralization of authority, which, if not arrested, may ultimately change the form of our political organization.

§ 21. State Interests. The highest interest of the State is maintenance of its character as State. There are two ways in which this chief interest can be menaced and defeated.

(1) The State may be deprived of its character as State by losing its authority to regulate conduct, where another social organization arises which regulates human conduct by uncontrolled physical force. Such an opposed organization may completely destroy the former state (revolution) or it may simply oust the former sovereign of authority in a particular territory (e. g. secession: so-called American Revolution). A mere change of government, either by way of (a) changes of the personnel of government or (b) changes in the structure of government, does not effect a destruction or alteration of sovereignty. Such changes of government are normal

phenomena and are even necessary for the continuity of the State. For example, the federal Constitution might be so amended as to change the government to the form of a unitary government, instead of the present form of a federated, composite government. It might even be changed to take the form of an economic corporation with unlimited control of all industrial objects. Such changes, however extensive, would not, from a juristic point of view, be revolutions. If, however, such a change either in the personnel or form of government were effected by successful manifested physical force, displacing every vestige of physical force of the earlier government by physical force, the result would be revolution. Just as changes in government are normal phenomena, so, also, on the present level of human habits, menaces of sovereignty are to be considered as practically unavoidable, and, to that extent, normal social phenomena. Contracts will be violated, torts and crimes will be committed, and more rarely offices of government will be usurped by fraud or by force. All such unlawful acts, in different degrees, are menaces of sovereignty which are successfully met and overcome or otherwise assimilated; but if the State could no longer muster the physical force to subdue these attacks on its sovereignty, it would soon cease to exist and a new State would arise to take its place.

In considering the juristic mechanics of changes in sovereignty, the data of history present these generalizations: Plural sovereignties in the same territory can exist only when instituted by constitutional arrangements (agreement: e. g. United States; former German Empire). A division of sovereignty, based on the kinds of conduct, may exist, but it will not endure because of the many collisions of au-

thority (e. g. State and Church). A division of sovereignty, based on the kinds of persons whose conduct is regulated, has never been known, although divisions of law and of government have been based on such a distinction (e. g. *jus quiritium* and *jus gentium*). Two sovereignties can not coexist on the same territory, each menacing the other by physical force. The clear tendency is toward a singleness of sovereignty in a given territory. This tendency is affected by the physical character of the territory itself and the kind of people who inhabit it (e. g. a homogeneous population in a compact territory will have a single sovereignty).

(2) The next way in which the sovereignty of the State may be menaced, is by interference from the outside. The jural effects of such outside interference may be of many different kinds. The State's territory may be occupied and pass under temporary military control, or its territory may be annexed in whole or in part. The least effect that may result from outside interference is an obligation to do some act (e. g. to pay an indemnity). Where territory is temporarily occupied by hostile force, sovereignty is not destroyed but is suspended. Where territory is annexed, sovereignty ceases in one State and passes to another. There are various degrees in which unlimited sovereignty (i. e. sovereignty of all functions) may be cut down leading to various kinds of partly sovereign and dependent states. Imposition of an obligation to do an act resulting from war or the threat of war, does not affect sovereignty.

It thus appears that the State has two chief interests which arise as a logical necessity from the nature of the State as defined. These two interests are (a) an orderly system of conduct within the territorial limits of the State, and (b) non-interference

by way of outside force. The first interest is that of Law and the second is that of War. These two fundamental interests in Law and in War are necessary attributes of all completely sovereign States.

The interests of Law and of War may have the greatest variety of manifestations, leading to different varieties of the State, not simply in political form, but also in political character.

§ 22. External Forms of the State. In political form, States may be *unitary* where there is a hierarchical form of organization and distribution of powers (e. g. France, Illinois) or *composite* where there is unity for certain purposes and diversity for others (e. g. United States, British Empire). Even where the State is unitary, there is not necessarily a unified system of regulating conduct. In Illinois, for example, there are numerous local governments such as towns, cities, and park boards, which regulate conduct, each in its own way, subject to negative limitations of the general legislature.

There are also various forms of monarchical and republican States.

The various possible classifications of States according to external form are conventional, rather than essential, and the terms used represent dominant qualities rather than absolute differences.

§ 23. Internal Forms of the State. States may differ widely in the range of expression of the two fundamental interests of Law and War.

A State that limits its energies to defense of its integrity as State, will be a different State from the one that seeks to expand materially. And here the material (the purely social) concept of the State becomes of great importance. The jural concept of the

State is a fixed idea; it is a logical idea, and, as such, does not have a history. But the social substrate of the conceptual State is a living thing. It increases or decreases in power. If the population of a country reaches a point where the territory is insufficient to provide a standard of life to support it, and if there is no outlet elsewhere for this human surplus, war against other States becomes a natural necessity. Human intelligence can not eradicate this law of expansion; it is as inevitable as the competition among plants for access to the favor of the soil and the sun. It is not, however, beyond human intelligence to discover a way by which this natural necessity of expansion may be turned into better channels than that of predatory war. Where a State by reason of its geographical situation is menaced by war, or is in a position where it must make war, the material energies of the State will be profoundly influenced in the direction of the development of the means of physical force. Military law, even in times of peace, will be quite as important a body of law as any other institution. The remaining fields of law will be affected to the extent that the interest of the State in War becomes of equal or greater importance than the interest in Law.

There is no received classification of States based on the interest of war, but they may be divided into three groups: (1) those with no need of protection from outside aggression (a) because of treaty protection, (b) because of such small power as to make preparation useless, or (c) because of geographical security; (2) those that need protection against outside aggression but which have no policy of expansion; (3) those that have the need or policy of expansion.

The interest in Law, also, has many different expressions both logically and historically. A classification made by German publicists is well known. There are three forms of State: (1) the Police State (Polizeistaat); (2) the Culture State (Kulturstaat); (3) the Legal State (Rechtsstaat).

The so-called Police State undertakes to make all the interests of society, the interests of the State. Here, the State usurps the fields of deportment, fashion, art, morals, and religion. At least that is the extremest form of such a State. The ancient Judaic State may be taken as one of the best illustrations of this form of State in civilized times. Modern States have progressively narrowed the field of law, leaving the fields of deportment, fashion, art, morals, and religion to be regulated by society at large in its own way, short of use of physical force or methods which abridge, unjustifiably, economic freedom.

The separation, however, of law from other normative fields can not be completely carried out. Morals is a larger field than law and embraces it, since all conduct is susceptible of an ethical valuation, even where there is no definite moral evaluation. Another reason is that in the application of law, it is not possible to avoid contacts with the other fields of conduct.

The smaller States of ancient times, and, especially, the City States of the Greek era, could, and did, confuse law with religion, deportment, fashion, and other fields, because of the homogeneity of the social organization, the powerful influence of religion, and the limited area of the State's territory. The modern State differs in all these points and also in others. The other chief feature is that the legitimate field of law in modern times has become so extensive that the State finds practical difficulty in

standardizing the new activities introduced by science and invention. The fields of conduct related to law have passed into the autonomous control of society acting directly through group organization, due to the need of specialism, the conviction that not all departures from social standards are worth the application of State force, and the need of the State to regulate the newer kinds of conduct, the necessity for which taxes the strength which society is able to manifest by use of physical constraint.

The last point, especially, should be stressed. State force is simply one of the forces of organized society. If all the power of organized society should be quantified, it would be found that not all of this power could be transmuted into State force. If that were possible, the political state would be not only sovereign, as it is, and necessarily must be, in a jural sense, but it also would be omnipotent in relation to its subjects. The proposition needs only to be stated to refute itself. It would also be found in a quantification of social force, that political force which is merely one, though the most important of the products of social organization, has a different potential at different times depending on the complex interaction of the human elements which are the cause of these phenomena.

The so-called Legal State (*Rechtsstaat*) is the very contrary in function of the Police State. While the Police State in its extremest form embraces all the interests of society, the Legal State adopts no more of these interests than are essential to the preservation of the State. The Police State has positive and negative functions. It not only prohibits but also commands. The Legal State prohibits but does not command. Its purpose is to leave the currents of life free; to let society work out its own

ends by its own means, so long as the utmost freedom is left to each one against force and fraud. The purpose of law in this State is to make possible an orderly competition of each with all.

This form of State in its extremest possibility has never been observed historically under conditions of civilization, but the Modern State is the direct heir of the Legal State. The Clan State was a Police State, but the early confederacies or Chieftain States were Legal States. The chief purpose of the barbarian State was to further the interest in war. The interest in law was only a subordinate interest cultivated to make the power of war more effective. The principal point of legal contact of the government of the Chieftain State with the subjects of the State was through taxation and when punishments were inflicted, it served two purposes: (i) to conserve the fighting strength of the group and (ii) to provide the resources necessary for war. After a time, the blood feud was replaced by the process of arbitration, and arbitration itself was succeeded by involuntary jurisdiction. Later still, the legislative function developed and with this, the modern State arose.

It would be very difficult to construct a reliable hypothesis of the social results under modern conditions of a system based on a minimum of constraint. That under such a system of law, society would be radically altered is easy to believe. This may be anticipated even by a cursory survey of the effect of such a system on legal institutions. If, in such a *Laissez Faire* State, it may be assumed that acquisitions of land and chattels would be protected, as well as corporal integrity and freedom of locomotion, then there would be only a law of torts and (or only) crimes. All the other fields would disappear

and become the subject matter of autonomous regulation. There would be no law of contracts, no family law, no law of succession, the law of property would be reduced to a minimum, and even the main category of criminal law would be reduced in extent.

That a *Laissez Faire* State in its extremest form is only a political theory is due to the fact of historical continuity. Only a revolution could make of it an actuality and that is one of the highest improbabilities, since revolutions, in modern times, have been based on revolt against acquisitions, and since it may be supposed that one of the economic effects of a *laissez faire* system would be to create a large slave class subject to the mercy of a property owning class.

The *Laissez Faire* State has much support, but in a less rigorous form than the one stated. The present institutions of law, family, property, contract, succession, would be preserved, but the State would be limited to the protection of acquisitions, security in promises, and stability of family life. It would stop short of all paternalistic interferences with conduct. Economic laws would be permitted to take their course. The State would never attempt to lead society but would remain in the background allowing the forces of society to work out social destiny in an ordered way, free from the anti-social hindrances of fraud and force. Such a State would have no interest in social welfare legislation. The poor, the sick, and the disabled would be left to the mercy of private charity or the harsh elimination of natural law. There would be no restraints on ownership or alienation, no intervention in contracts freely made, no interference with personal habits or tastes. Family life would be regulated, if at all, only for the protection of infants, or for protection of marriage con-

tracts. In a word, such a variant of the *Laissez Faire* State would be concerned chiefly in defending the natural expression of social forces against forces that work against the integrity of the social organism, and it would ideally not attempt to direct these social forces into predetermined channels.

The Welfare State is a mean between the Police State and the *Laissez Faire* State. The difference in these forms of State is not one of kind but only of degree. The lines, therefore, can not be sharply drawn and it would be difficult to say at what point Welfare State becomes a Police State, on one hand, or becomes a *Laissez Faire* State on the other. Modern States are Welfare States. They do not assume to take over fields of conduct which can better be regulated by autonomous social control, nor yet do they leave problems of social welfare to social control where such control is likely not to exist or is likely to develop imperfectly.

A few miscellaneous examples will indicate the need of State control. Paupers and mentally deranged persons are a product of society. Private charity can not be relied on to relieve the misery of all of them and it seems humane and expedient, if the State can not prevent the phenomenon of mental and physical inferiority by direct measures, that it should assume the burden of these phenomena. Again, if the planning of streets and the creation of parks were left entirely to private control, the growth of cities would be retarded, transportation systems would be difficult, if not impossible, and parks and public places rarely would be found. Finally, if public utilities were permitted to operate without restriction, the tendency under unenlightened management would be toward the scantest service for the highest price that could be exacted.

The Welfare State, itself, in modern times, has developed several forms. (1) The first of these is that where the State regulates public highways and lines of communication and the use of them without attempting similar control over private roads or the persons who use them. In order to create such highways, the State grants powers of condemnation to cities, to transportation companies, and other public utilities. In turn, the State regulates rates and conditions of service, where these highways are used for gain. An activity of the State which grows out of the control of highways is the creation of public places and parks. This activity is not a necessary one for the State, but highways are a material necessity in the Modern State where private ownership is recognized, since without highways not only could there be no commerce, but even the government itself could not function. The government needs a territorial seat where it may house its officers, and there must be highways in order that the subjects of the State may approach the government. This fundamental fact is perfectly obvious, but it has a significance not itself obvious. Even the *Laissez Faire* State in the extremest form that could be imagined, could not function without a territorial seat and a system of highways. It was on these highways in the earliest history of our legal system that the law manifested itself in the institution of the King's Peace which may be said to be the starting point of our legal structure. The first form of the Welfare State is an extension of law over these highways.

(2) Another form of Welfare State is that where the State undertakes not only to control public highways, but also operates the utilities that use these highways. In several European countries, railroads and telegraphs are owned and operated by the State

in the same way that the postal system is owned and operated by our federal State. The problem involved here is one of political science and economics rather than of pure law. The chief difficulties, among others, of this extension of State activity, are lack of experience, difficulty in finding by political methods competent managers, lack of flexibility in control, and lack of strong personal interest in attaining the best results. But, against these objections, it may be said that human experience with these activities is still new, and that, perhaps, with better methods of administration, these difficulties will disappear. No doubt the postal system and even the police system could be administered at this time with less expense and with greater efficiency under private control than under public administration; but the tendency of social organization points to an increasing activity of the State in all directions, especially in fields where competition is necessarily wasteful without corresponding advantages, as for example in the operation of street cars or the production of gas and electricity in the same streets or territory. In these, and in similar cases, the State must either grant a monopoly subject to regulation or undertake operation. Perhaps the leading objection to State operation of natural monopolies is that human nature is such that the lack of an interest in ownership will always give results falling short of what may be expected under private ownership and control, but there is no proof that human interest can only be aroused by the fact of ownership or monetary gain. There is much reason to believe that the contrary is true, and that the highest and best forms of human endeavor can be aroused by rewards and satisfactions wholly unconnected with economic advantage; and it is the task of political science in the

growth of the State's activities in new directions, to discover how these forces may be enlisted in the right way.

(3) A third form of the Welfare State is where the State going beyond the regulation or operation of the highways of commerce and communication and certain allied activities, such as the production and sale of gas, electricity, and water, undertakes the production of goods carried in commerce. To some degree, all modern States produce goods which are sold or given to the public or used by the government. The manufacture of coined and paper money is the most necessary instance. In public institutions for criminals and the insane, goods are commonly manufactured or agricultural crops produced, as a part of the plan of regulation of these institutions. These goods may, or may not, come into competition with the goods produced by subjects of the State. In the same way, the government may, and often does, directly manage and control the construction of various public works. Up to this point, this species of Welfare State does not strikingly differ from other forms of the Welfare State, but when the Welfare State goes beyond the limits of what is directly connected with the regulation of the *form* of conduct and itself acts in the same sphere where regulation is imposed upon others for similar acts, then it takes on a new form. It then becomes an Industrial State and if its activities on a large scale supersede the activities of the subjects of the State acting for themselves, the State becomes a Socialist State.

§ 24. Recapitulation. The State has three necessary conceptual elements: (1) Sovereignty, (2) government, (3) subjects. The State itself is not a

society or an organization of human beings, as is commonly asserted, but is the concept of such an organization under conditions where sovereignty exists for any purpose. There is a logical and also a practical reason for this view. The relations between State and subject, as relations, necessarily are conceptual since a relation is only a concept, and since, furthermore, there can be no relation with material elements. The practical reason is that law can not be referred to a given material group of human beings in a material sense since the group is constantly changing, and since, furthermore, the actual human forces of law can not be attributed to the society as a whole, but must be referred to leaders of society and powerful groups in society whose identity is never clear.

The material elements of the State are human beings and lands and chattels. The material content of the State is a politically organized society of human beings, and the government also must manifest itself through human beings. Lands and chattels are necessary for conduct, since human beings need land and movable objects to maintain human life.

There is nothing in the concept of the State that indicates the essential nature of the State or its purposes beyond its own maintenance as a State. Those essential elements are an interest in Law and interest in War, at least for preserving sovereignty in Law. The interest in Law is primary; the interest in War is secondary. These are the irreducible elements of State interests. The actual form that they take historically is not given by the State concept itself but depends on the human forces that are the substrate of the conceptual State.

The interest in War may be either defensive or offensive. This will be determined by economic wants, policy, or even social necessity. Accordingly, the factual manifestation of State power will differ among different States and at different times.

The interest in Law, especially, presents the greatest variety of forms ranging from the pure form of the *Laissez Faire* State to the Police State or the Socialist State. The evolution of these forms, historically, has taken this course: in primitive society, the Police State prevailed; in barbarian society, the confederate State arose as a *Laissez Faire* State; in civilized times, the Welfare State arose. The (now) non-legal functions of the primitive Police State were absorbed by the constituent political divisions of barbarian confederacies. In the period of civilization, these same non-legal functions retroceded into the social fabric and fell under the exclusive control of the family and of other social groups. Exceptionally, even within the era of civilization, these non-legal functions reappeared as legal functions, as in the Greek and Italian City-States. Sporadically, the effort to take over these non-legal functions reappears in modern states, since the force to govern all fields of conduct is always present in society, and since the groups interested in standardizing the non-legal functions sometimes under particular oscillations of social forces succeed in bringing them back again for longer or shorter periods to the level of political regulation.

The Welfare State has definitely and even finally superseded the earlier forms of States and the future movement of development under the actions and reactions of social forces probably will lead to various oscillations between the limited form and the most extensive form of the Welfare State. This move-

ment within the present form of the State will correspond point for point with the competition of the *Laissez Faire* and the *Police States*. The eventual result is not unlikely to be, not an extreme form of *Welfare State*, but rather a further differentiation of structure and organ in human society outside of the political State which conceivably may grow to such proportions as eventually to reduce the activities of the political state to the scope of a *Laissez Faire State* in purer form than ever before has been historically observed. This newer form of organization may be an industrial organization with powers and functions as separate, for practical purposes and with similar limitations, from the political State as was the gens of Roman law or the trade and merchant guilds of the Middle Ages. Up to this time, however, the social structure has not been sufficiently studied to make it possible to predict with scientific assurance the definite future forms of the States; but that the State as it now appears in civilized countries will materially change in internal structure and in function, admits not of the slightest doubt. The fact of change may reliably be predicted, but the course of development is not yet within the reach of scientific knowledge.

§ 25. Powers of the State. The political State may conceivably have as wide a range of activity as a private corporation. Some of the things it does, or may do, are to make legal rules; to make a decisional application of legal rules in an actual controversy; to carry these decisions into practical effect; to appoint officers; to supervise elections, to count votes, and to certify the result; to give advisory opinions of what future application of law will be made; to investigate what is the prevailing

legal rule in an actual controversy; to investigate what legal rule should be created or what legal rules should be changed or abrogated; to draft into service soldiers and sailors; to make offensive or defensive war; to enumerate the kinds of economic values in its territory, to assess these values for taxation, and to collect the taxes; to borrow money; to operate banks; to manufacture paper and metallic money; to build ships, arsenals, docks, and military encampments; to collect, transport, and deliver letters, periodicals, and merchandise; to grant letters of marque and reprisal; to accept bonds of recognition; to operate prisons; to receive ambassadors and grant exequaturs; to grant medals for heroism; to make requests of another State; to enter into discussions with other governments; to lend money; to grant pensions; to manufacture law books and periodicals; to obtain by purchase lands and chattels; to make contracts; to inflict harms on others by its agents; to inspect foods and drugs; to examine immigrants; to issue passports; to lay out, construct, maintain, and repair roads; to sue and be sued in its own courts; to sue in a foreign court.

This rough enumeration will no doubt suffice to show the wide range of activity of the modern State. This enumeration with the least effort could be extended to an indefinite length. It will be seen that depending on the range of interests that the State takes unto itself, it may do anything that any private corporation may do. The larger modern States already undertake all the functions of all classes of corporations classified from the economic standpoint—manufacture, transportation, agriculture, banking, etc.—and also of corporations not in the economic field—science, education, art, etc. They do not, however, undertake all the specific activities of all of

these gainful and non-gainful corporations. For example, the United States does not engage in the clothing business or the grocery business, although it may be compelled to buy clothing and food for the use of its armed forces, and, sometimes, to sell surplus merchandise.

In addition to exerting all the generic powers of all classes of corporations, if not, also, their specific activities, the modern State has certain powers that no private corporation can exercise. Some of these powers are: to manufacture legal tender money; to make war; to make, apply, and carry out rules by lawful physical coercion.

We can not, therefore, look to the nature of the private corporation to find the limits of activity of the State. It has a greater range of generic activity than all the kinds of private corporations taken either singly or in combination. To find these limits we must compare the State to the individual human being, and here we find that what is peculiar to human beings can not be true of the State or of any similar organization, since the State is purely conceptual. A State can not take exercise, eat or digest food, or perform any other physiological function. Metaphorically, however, all the functions of human beings, find their representatives in the functions of the conceptual State as manifested in its government—cerebration, volition, motor expression, assimilation, etc. Several writers have carried out the comparison to an elaborate detail, one writer pursuing the organic metaphor so far as to attribute masculinity to the State. But putting aside for the present purpose such comparisons and restricting the comparison to the relations possible to the State and to human beings, we shall find that in what concerns the field of law, the limitations on what rela-

tions the State may have as compared with the relations that human beings may sustain are surprisingly few. The physical *acts* that give rise to contracts, torts, crimes, and property are common to both. We say the physical *acts* and not the *consequences*, since the State as the jural sovereign can not enter into a contract, commit a tort or crime, or own property. All these concepts are legal concepts and the State as the fountain of law can not make law for itself. The assumption itself is destructive of jural ultimateness.

The one field that suggests itself for the discovery of limitations in State relations is that of so-called personal relations which relate to the integrity, movements, and qualities of the human body. A State can not enter into a physiological marriage but yet it may make treaties which correspond to the economic state of marriage; the State, in a juristic sense, being a concept can not suffer corporal harm, yet its territory may be invaded or threatened by the enemy without, or imperiled by treasonable acts by the enemy within. The State's reputation may be harmed by seditious utterances corresponding to libel and slander of subjects. And, so, in various other ways analogies may be found which point to a surprising range of State interests and activities.

§ 26. The Three Powers. It is generally supposed that there are but three powers—legislation, adjudication, and execution. This supposition is faulty in two directions: (i) the enumeration is not complete; (ii) it is logically inaccurate.

(i) The incompleteness of the enumeration of legislation, adjudication, and execution, may quickly be found when any governmental function is ana-

lyzed. Taking the judicial function for examination, we find that the judge has, among others, the following activities: (a) examination of pleadings, (b) listening to arguments of counsel, (c) hearing testimony, (d) examination of 'real' evidence, (e) empanelling of jurors, (f) ruling on pleadings, (g) ruling on admissibility of evidence, (h) regulation of discipline of court-room, (i) supervision of trials, (j) making of rules of procedure, (k) control of trial calendar, (l) supervision over process (summons and notice by publication), (m) examination of reports of referees and masters in chancery, (n) search for legal rules, (o) application of formulated legal rules to cases, (p) construction of new rules, if a formulated rule is not found, (q) statement of reasons for decision, (r) instruction of jurors, (s) approval of bonds, (t) settling and signing of bills of exception, (u) fixing time of appeal, (v) supervision of court records, (w) supervision of executions and capias.

This enumeration of activities of the judge, discloses that he may make application of new rules of law and that he may apply rules of law already formulated. As these terms are usually defined, the judge must adjudicate and also legislate. If a rule of law is not found to govern a given case, the judge does not dismiss it, but makes a decision which either follows a rule newly formulated or produces a new rule as a logical consequence. In either case, the substance of the matter is the creation of a new rule of law. This would still be true where the court mistakenly applies an existing rule. The actual decision is the controlling fact and may point to a new rule or the modification of an old rule, although a rule so brought into being would have less force, as a source of law, than a new reaffirmation and applica-

tion of an old rule or even than a conscious departure from an existent rule.

But while legislation and adjudication are normal activities of judges of courts, the above enumeration of activities can not by any type of definition be confined to these two categories, or included under Executive, as that term is commonly understood. Looking at the work of the judge as something to be planned and carried out under rules which only in part direct the course and concrete steps to be taken, he must organize the concrete setting of trials; he must supervise the course of the trial; he must listen to what others tell him as to his own conduct; he must examine the trial facts; he must consider their legal effect; he must search the law on doubtful points; he must decide finally; and then he must direct the concrete effect to be given to his decision. There are no law terms or terms of political science either to designate each of the atomic activities of the judge. These are not even terms to group these activities into masses, but, resorting to lay language, we see that the work of the judge is not only Legislative and Adjudicative, but also Organizational, Supervisory, Preparatory, Executive, Ministerial, and Discretionary.

Similar results would be yielded if we examined the actual day by day activities of a legislature.

(ii) The inaccuracy of the tripartite classification is shown by the term, Executive. By federal Constitution "the executive power shall be vested in a president." The same Constitution provides an oath of office by which the president undertakes that he will "faithfully *execute* the office of president" and will "preserve, protect, and defend the Constitution." The president is made commander of the army and navy; "he may require the opinion" of

the heads of "executive departments"; he may grant reprieves and pardons; he may make treaties (with the coöperation of the Senate); he may appoint ambassadors, judges, and other officers; he may fill vacancies in office; he may read messages to Congress; he may convene Congress; he may receive ambassadors; "he shall take care that the laws be faithfully executed"; he shall commission officers. This in substance is the scope of the duties and powers of the chief 'executive' of the United States. If the term 'executive power' has any accurate meaning, it should be deductible from these duties and powers.

Strangely enough, the term 'executive power' has two meanings which are anti-polar. One meaning is that it is a concrete doing of something that the law requires. Thus a sheriff in hanging a man is performing an 'executive' act. This meaning probably also is broad enough to include the power of directing such a concrete act. If that be true then the judge who inflicts a sentence of death and commands the sheriff, accordingly, is doing an executive act. In many other ways the work of a judge is executive. When he hears testimony, when he organizes his trial calendar, when he makes minutes of his own orders, when he opens court, and in various other ways, the judge is doing executive acts. To escape this particular difficulty, we may attempt to import the distinction of 'discretionary' and 'ministerial' but that escape may be put aside, either because it is unavailing to explain all activities, or else because it is an unnecessary one.

The other meaning is that an 'executive' is one who in a political State represents the highest power in war, legislation, organization of powers, civil and criminal prosecution, and direction of departments

created by legislation. 'Executive power' also includes the activities of those subordinate to the chief executive. This meaning coincides with the meaning of 'executive' in business corporations, with the difference that legislative and adjudicative functions are not separated in business as they are in the modern political State.

The duties and powers of the president indicate that he is the chief organizing officer of the government as shown by his powers of nomination (ambassadors, judges, and other officers); he is also the chief legislative officer (proposals for legislation, veto power); he is the officer of foreign relations (reception of ambassadors, commander of the armed force); he is the chief prosecuting officer (as the head of department of prosecution); and, lastly, he is the chief officer of departments created by Congress for the control of rivers, forests, agriculture, post office, etc. It may be noted here that the president is not executive head of all agencies or departments created by Congress. Some of these, such as the Interstate Commerce Commission are autonomous. Roughly generalized, the president is not executive head of those commissions which exercise adjudicative power. This generalization is of assistance in another way. The federal Constitution has attempted in actual effect to separate in the original structure of our government, the legislative and adjudicative functions, and has grouped all other activities of the State under a single term, 'Executive power', so that what is not legislative power or adjudicative power, is executive power.

The importance of the question arises in two ways. First, the structural plan of American government is to separate sharply the legislative and adjudicative functions. Subject to various historically de-

rived exceptions, the legislature must not adjudicate, and the judicial establishment must not legislate. Dean Wigmore ("Problems of Law") has discussed the question whether such a separation is desirable and he has shown that it is unnecessary and is not practically carried out.

As an illustration of this separation of powers, a legislature can not make a conclusive finding of facts, and upon it direct a city to pay a claim; a legislature can not set aside a judgment of a court; a legislature can not validate warrants issued under an unconstitutional law. On the other hand, a court can not, apart from actual litigation, make a declaration of law; a court can not appoint officers to collect a tax to pay a judgment against a city; a court can not, even if the legislature authorizes it, change the boundaries of a division of the State's territory.

Secondly, the question of the separation of powers arises where an attempt is made to delegate one of the three powers. The question of delegation rarely is presented with respect to the executive function, since the executive function is commonly ministerial rather than discretionary. The distinction here is between judgment as to *what* to do and as to *how* to do it. Thus, a sheriff who, by any test, is clearly an executive officer, may delegate the power of making a levy or imprisonment of an offender or of inflicting capital punishment, to a deputy. The power of arrest also may be delegated. But a governor with power to pardon can not delegate this power to another.

It is sometimes said that neither the legislative nor the adjudicative power can be delegated, but this statement is inaccurate, although there can be no delegation of legislative or adjudicative powers without limitation. And, as between the legislative and

adjudicative functions, the limitations in American constitutional theory are more strict with respect to delegation of adjudicative power. This is due to the fact that American constitutions are only *limitations* on the power of the legislature while they are *grants* of adjudicative power. The legislature may act in any way not forbidden by the constitution, while courts can act only within the scope of their grant of power. Thus, a judge can not delegate power of decision to a private person or to an officer not a judge of equal power and a member of the same court. Such a power in a private person could not be created, even by consent of parties to litigation ratified by an order of a judge. However, the question of limits is not entirely one of logic but is preponderantly one of historical example derived from the method of organization and the powers of the British Parliament and the courts of Common law. Some delegation is tolerated even of the adjudicative function, as in the case of referees and masters in chancery.

Where the legislative power is undefined, it may include judicial and executive functions. The power of delegation has had a more significant manifestation in the legislative function than elsewhere. The historical need of local government and of special commissions, is very old but the rise of the industrial commonwealth, especially, has clearly developed the fact that no central legislature in a large, active, industrial State can enact all the legislation needed in such a State as a Welfare State. Therefore, a large part of the legislation of a modern State is enacted by local governments and by various boards and commissions dealing with such subjects as transportation, commerce, parole and probation, workmen's compensation, agriculture, mining, forestry,

occupations and professions, and health. Therefore, sections of the fields of possible legislative activity have been delegated to inferior agencies, subject always to the control of the central legislative organ.

But the need and practice of legislative delegation have presented another problem in that these inferior agencies often and quite generally are invested with powers that are a compound of the legislative, adjudicative, and executive. The same problem of separation of the basic powers again arises but in a form that is practically difficult sometimes to analyze because of the concreteness of application of the activities of these subordinate agencies. Thus, the question arose whether workmen's compensation acts did not invest judicial powers; whether parole boards were not unlawfully legislating in formulating rules and whether the same boards were not exercising adjudicative functions; whether boards of health with powers to revoke licenses to practice medicine were not also exercising adjudicative functions. In general, these newer agencies of political control have been able to survive constitutional attack, but the reasoning of the great bulk of the cases while pretending to follow lines of logical distinction in the separation of powers has failed to clarify the distinctions to which appeal is made.

§ 27. Logical Separation of the Three Powers. In an effort to separate the powers with logical distinctness, it is necessary to reduce them to atomic elements where by no possibility one activity can, or does, become identified in whole or in part with any other activity.

Legislation is the creation, alteration, or abrogation by the government of legal rules.

Adjudication is concrete application of a legal rule by the government in a conflict of asserted rights.

Execution is any other activity of the government which has an affirmative result.

Legislation. The definition proposed is the widest sense of legislation. It includes rule-making by any agency of the State. There are various types of legislation: (a) abstract declaration of legal rules (e. g. statutes, rules of court, rules of boards and commissions); (b) judicially applied legal rules (judge-made law); (c) executively applied legal rules (e. g. as when a governor makes a rule when acting on a warrant of extradition).

The activity called 'legislating' is not affected in its nature by the department of government which legislates. That department of government whose chief function is to make, alter or abrogate abstract legal rules is called the 'legislature', but the legislature may and does have other functions. That department of government whose chief function is to settle legal disputes also legislates when no applicable rule of decision can be found, since a court does not dismiss a suit if a legal rule is not already in existence to govern it. If there is no such legal rule, the court invents one, although it may be again recalled that the fiction is that a rule always has existed and that the decision is only evidence of the existing rule.

Adjudication. The function of adjudication belongs chiefly to the judicial department of the government, but not exclusively. The legislature formerly tried divorce cases; in England, the Parliament still has important adjudicative powers; and all legislatures try questions of contempt, impeachment, and disputes as to membership. Nearly all boards and commissions, likewise, have power to adjudicate; thus, workmen's compensation boards

hear evidence and make awards of money for personal harms suffered by workmen.

Execution. While the legislative and adjudicative powers submit of clear cut definitions making it possible in every case to know accurately whether what is done by the government is legislative or adjudicative, the Executive power is amorphous. To say that every activity that is not legislative or adjudicative is executive, makes the term 'executive' so extensive in application as to be practically meaningless. The etymological idea is 'to carry out', 'to accomplish', 'to complete', and in a wider sense, 'to perform', 'to do'. The more limited meaning suggests acting in accordance with a predetermined plan or an order; the wider meaning suggests any act. It is obvious that if the wider meaning is taken, then all the activities of the government are executive, since the legislature acts in accordance with its own ideas of what is politic when it makes a law. Likewise, a court in following a statute, or a course of decision, makes a decision. So broad a meaning of what is 'executive' reduces all the functions and activities of the government to 'execution'.

The more limited meaning of 'execution' as an act done in pursuance of an order or command, is also unsatisfactory. When the legislature enacts a law, there is an implied command in it, that the courts give it effect. The court, under our system of law, has independent power to determine whether it will or will not give it effect, so far as concerns constitutional validity, and the court also has independent power to construe the command, but having resolved these preliminary questions, it then proceeds to carry the command into execution by deciding in accordance with the legislative object. This meaning, therefore, reduces the adjudicative function, so far as it

is based on legislative command, to mere execution. That discretion enters into it, does not change the matter.

If now to avoid the difficulties in part above suggested, we attempt to give the term a more rigorous meaning to exclude legislative and adjudicative activities, we meet another difficulty. For example, we may attempt to define the 'executive' power as 'a concrete act applying a legal sanction'. When a sheriff levies on goods, he is applying a concrete sanction, and, therefore, is doing an executive act. That meaning would not embrace such acts as the entry of a judicial order by a clerk of court, the issuing of a summons, an appointment to office, a calling out of the militia, a purchase of supplies, entering into a contract, operation of a hospital, etc., etc. If we extend the definition, we only increase the range of indefinite meaning. It would seem, therefore, that the term 'executive' can have no useful place in an enumeration or classification of governmental powers; that no other single term can avoid the difficulties of application; and that the powers of government, other than the legislative and adjudicative, must be classified on a different basis.

§ 28. Confusion of Powers. Doubtless it was the theory of the eighteenth century writers that the powers of government could be logically and practically separated. It was then believed that such a separation was necessary to prevent tyranny in the government. That such a separation of powers might be desirable for the purpose of attaining expertness in government by a division of labor was perhaps a minor consideration. It was not then clearly understood that there might be other ways to avoid the misuse of power than by a separation

of functions, although in practice these other devices were regularly used. For example, the only conceivable reason for a bicameral legislature (e. g. House of Representatives and Senate) is to provide checks on legislative activity. Likewise, the system of appellate courts (e. g. trial court, court of appeal, and supreme court) was devised as a check against error, and, especially, against misuse of power by the courts. It is clear that the fear of arbitrary government was the dominating factor in our political system. Not only were the powers divided horizontally, but they were also separated vertically. The horizontal division involved only practical difficulties easily remediable to avoid conflicts of jurisdiction, but the vertical separation was both logically and practically impossible. Each of the three constitutionally independent (of each other) departments of government exercises in various ways functions of the others. Sufficient examples have already been adduced, and the fact is so clear that the courts now readily admit that a logical separation of powers is practically impossible. This admission, however, has usually been made to justify the existence of boards and commissions which more clearly and widely exercise legislative, adjudicative, and other powers of government than the superior departments of government.

Yet, for the superior departments of government, the view still prevails that the powers of government can be and actually are separated. And, here, too, sufficient examples have been adduced to show that the contrary is true.

While our American political system is theoretically based on a logical separation of powers into an independent legislature, independent courts, and an independent executive, yet the actual practice is

based on something entirely different—a distribution of powers on a common law basis with limitations only on the legislature, and a grant of power to the executive and to the courts. In a word, what has not been granted remains with the legislature. The power of the courts remains in substance what it was at common law; the executive power of the head of the government has had only the alterations that would go with a republican form of government; but the legislative power has been cut down. The total effect of our American plan of government has been to shift the center of governmental supremacy from the legislature (Parliament, at common law) to the courts.

Questions concerning the distribution of powers are to be answered, therefore, not by logic but by history. The practical difficulty of these questions arises from the fact that the solutions often are based on logical premisses with an unconscious shift to historical premisses. When this occurs, it is quite impossible to understand the basis of separating the powers. For example, it is said that the legislature may enact rules of evidence but that it may not enact conclusive rules of evidence. To make conclusive rules of evidence (e. g. that a certain fact shall be conclusive evidence of fraud) is regarded as an interference with the independence of the courts, yet it is impossible to find any logical distinction between presumptive rules of evidence and conclusive rules of evidence. As interferences with the judicial process, they differ only in degree and not in kind. Moreover, there are many forms of responsibility fixed by the legislature where there is left to the courts only the mechanical task of application. All rule-making is an interference with the judicial proc-

ess in that it directs the judge as to what action to take on given facts.

Again, it is held that a legislature may not by a subsequent declaration of meaning of an earlier law bind the courts to accept that declaration for past instances. If, for example, a statute has been construed by the court to mean *a*, it is incompetent for the legislature by a later declaration to make that meaning read *b* as to instances antedating the new declaration. The effect of this rule is to make clear that the supremacy of law declaration lies with the court and not with the legislature. From the standpoint of logic, the solution is unjustifiable, since the power of making rules in no way can be affected by the fact that it has a retrospective operation. There may be, of course, reasons of policy why a rule of conduct should be applied only prospectively, especially in criminal cases, but there is no premiss of logic that excludes legislation from operating on past situations of fact. When the courts assume to be the final authority on the meaning of abstract declarations of law (i. e. by the legislature) they assume legislative power, and, clearly so, when they deny to the governmental organ that enacted the rule any power to interpret the rule. The solution reached on this problem pretends to be based on a distribution of powers, when, in fact, it results in a confusion of powers which invests the rule-applying organ of government with legislative dictatorship.

It is generally assumed that the American plan of government is based on a written constitution in contrast with the English plan which is founded on an unwritten constitution. It already has been shown that the chief difference between the English and the American plans of government is to put the center

of supremacy in the judiciary instead of the legislature, leaving, however, the center of initiative in alterations in the law in the legislature. In accomplishing this shift of the gravitational center, the legislature has been limited, but the court has been left unlimited even as to its own jurisdiction, since the court in the last resort is the final authority which determines the limits of this jurisdiction.

The important political fact to be noticed and emphasized here is that no constitution practically can be entirely written, and, especially, is this true in the most important issues that affect the existence of the State. There is nothing in our Constitution that grants or prohibits to the court the power of declaring that congressional legislation is unconstitutional (unless it is a necessary logical inference). That power over legislation is one assumed by the courts and long accepted. It is now a part of our unwritten constitution. The power assumed by the courts over retrospective declarations of law, likewise, is another accepted principle of our unwritten constitution.

Another important political fact to be noticed and emphasized is that it is impossible in any constitution, whether written or unwritten, to escape the fact of governmental supremacy. Like sovereignty, governmental supremacy can not be distributed. It is unitary and indivisible; but just as there are or may be various sovereignties operating alongside of each other, so there may be various governmental supremacies in juxtaposition. What these supremacies are is to be determined by an inspection of the activities of the government and by discovering the locus of final control. For example, in so-called political questions, the executive department is supreme. Whether war exists or peace, whether a

political association is or is not a *de facto* government, whether a certain person is or is not an ambassador, whether a given territory is within the jurisdiction of the law—these and similar questions are beyond the unwritten powers as now exercised by courts to answer. Impeachment of public officers for official misconduct under the federal Constitution lies in the supremacy of the legislature. Supremacy in initiating statutes lies with the legislature, but supremacy here ends with the bare activity of initiation, since the actual result of this activity depends on the application which the courts make of these statutes. Likewise, whether a statute is constitutional or not, lies in the unwritten supremacy of the judiciary, and, similarly, when a court makes a new rule of law in the process of adjudication, it is the ultimate authority on constitutionality of its own legislation.

The ultimate factual supremacy of governmental power lies with whatever agency of government that exercises the power in regular application of the power without successful factual interference by another agency of the same government.

§ 29. Generalizations on the Separation of Powers. The object sought in an effort to separate governmental powers was to escape tyranny. It was supposed that if all the powers of government were concentrated in one person or one class of persons, that government necessarily would be arbitrary. Therefore, so it was reasoned, these powers must be separated. This reasoning defeats itself. First, it is impossible that all the powers of government could be exercised by one person or one class of persons without some such distribution of activities as now obtains in all civilized countries. Secondly, the

powers of government have not in fact been separated; they are confused in all departments of government and especially in those created by the legislature. Thirdly, it is impossible to escape the fact of governmental supremacy in all the activities of the State. Somewhere must be found the locus of ultimate control. What is ultimate control also may be ultimate tyranny and arbitrariness. There can be no direct check on this supremacy wherever it is found.

While the fact of supremacy can not be escaped, yet there is a significant difference in where it is lodged. If the executive and legislative functions were united in a government made up of office-holders with a permanent tenure of office, it is likely that the government would go to extreme limits, and, especially so, if there were no supervision over legislation. But, when the greater part of the supremacy of law is lodged as it is, in our form of government, in the courts, there is little likelihood of tyranny or arbitrariness, since this supremacy can only be manifested in adjudication of single controverted cases. Freedom from arbitrary government was achieved in our political structure, not, chiefly, by a distribution of powers vertically and horizontally, but rather by changing the center of supremacy from the legislature to the courts. No doubt, the system of checks and balances, as commonly understood, has been an important auxiliary preventative against arbitrariness, but so little is its value in modern times that greater efficiency in government suggests a lessening of complication in the machinery of government, especially in the field of legislation. The bicameral legislature already is looked upon as an anomaly and other solutions are readily conceivable which would make legislation at

once responsible and responsive to the currents of social development.

The industrial era has so vastly increased the range of activities of the State, that the pressure has reacted on the constitutional structure in all directions, and has affected the older theories of the separation of powers. Neither the legislature nor the courts, under the original form of organization, are equipped to do the work that the modern age requires to be done. One of the by-products of the older theory is that neither the legislative nor the adjudicative function can be delegated, but this constitutional rule has broken down for legislation, although, in the main, it remains intact so far as concerns the courts. The constitutional reason for this difference is that the American form of constitution is only a limitation on the legislature and is a grant of power to the courts. The legislature may delegate powers of legislation within limits of action prescribed, or to achieve a purpose defined in advance. This subordinate legislation is always subject to legislative control but it does not require specific legislative validation. The courts, on the other hand, are powerless to act in a similar way even where they are aided by juries, commissioners, masters, or referees; they must, themselves, at last pass upon the findings of their delegates. To a certain extent, the pressure on the courts is relieved by legislative delegation of adjudicative powers to boards and commissioners and by conciliation and arbitration tribunals, but the increase of these agencies only increases the number of tributary streams all of which may lead to the main channels. The flood of litigation can only be stemmed by a multiplication of courts and judges. In view of the fact that the supremacy of law is lodged in the courts and that, ac-

cordingly, the chief support of the State's internal stability rests with the courts, the situation already is one that urgently demands attentive consideration.

§ 30. Classification of Powers. It has been seen that while a separation of powers is logically possible, in practice a rigid separation of powers is not historically verified. A more profitable solution of the logical, legal, and practical difficulties encountered will be attained by avoiding a causal approach and by resorting to a teleological view of the problem. In a word the effort should be to classify, not the actual activities of the government which are very numerous and difficult to arrange into clear-cut compartments, but rather to survey the immediate ends or purposes of governmental activity. These activities may be classified into the following groups:

1. *Organization.* This includes the creation of offices and it should also include appointment to office. The organizative power is commonly vested in the legislature but often the power of appointment is vested in an executive officer, and, more rarely, in courts. The organizative function is not a law-making (i. e. rule-making) function; historically it is allied to legislation. The appointive function naturally suggests a distribution of power according to the end sought. Thus, the chief executive should have the power of appointment of those in so-called 'executive' offices, and the highest courts should have power of appointment of inferior judges. The practice, however, is otherwise. Under the federal system, the president nominates even judicial officers. This misplaced power in no imaginable way has any connection with a theory of separation of powers and does not in practice promote efficiency of selection. On the other hand, it rather makes it pos-

sible for the executive to influence future judicial policy.

2. *Legislation.* The chief object of a legislature is to enact abstract rules of human conduct, but allied with this purpose are other activities, such as the granting of pensions and other forms of so-called special legislation, and including, also, the power to declare war. In order to achieve the chief object (i. e. legislation) it is desirable that the legislature have other incidental powers, such as the power to pass on the qualification of members, the power of expulsion, power to impeach officers for misconduct, power to investigate, power to punish for contempt, and the power to supervise and control legislative buildings, legislative publications, and the purchase of supplies and commodities.

3. *Adjudication.* The chief purpose of the adjudicative function is to settle concrete controversies by an application of law. In order to accomplish this object, courts must interpret existing legislation and where no applicable rule is found must construct one. American courts have excluded the legislature from the power to make retrospective declarations of law contrary to judicial precedent. This is, in fact and effect, a usurpation of legislative power, but, strangely enough, the courts have not claimed for themselves the exclusive power to regulate their own procedure, or complete control over the rules of evidence.

In a rigorous distribution of powers based in the object to be achieved by organs of government, all matters incidental to the administration of justice outside of formal legislative declarations of substantive rights would lie in the competence of the courts. Thus, the methods of presenting controversies, that is to say all questions of pleading and

practice, including all rules of evidence, would be for the courts. While in fact, the whole body of instrumental rights in the common law is chiefly the creation of the courts, yet the legislature always has held a supervisory control over these matters, and this still remains true under American constitutions. It is probably due to this fact, above all others, that the progress of the law has been more deficient in the judicial administration of law than in other fields. It can hardly be doubted that if the courts had been invested with, or had assumed, plenary powers in the sphere of instrumental rights (procedure) methods would have been found to make the administration of justice more efficient than is possible under a system where a coördinate organ of government attempts to regulate in detail the machinery of operation of another department of government by inflexible rules. The result has been that much of litigation is a contest over the rules of procedure themselves, where, too often, the substantial rights of the parties are obscured or forgotten.

We have already seen that the courts exercise legislative powers in the making of rules within the area not occupied by enacted law. Courts also exercise a great variety of other functions incidental to the labor of adjudication; for example, control of court houses, appointment of court-room employees, control of judicial records.

The adjudicative function also includes all the steps and processes leading from summons or arrest to execution of judgments and all the officers concerned in these processes are officers of the judicial organ of government under this classification.

4. *Police.* The police function of the government has a wide range. It includes all the activities looking to factual realization of peace, order, health, and

general welfare. More specifically, the police function embraces surveillance of subjects to guard against crime, inspection of persons and goods, supervision of weights and measures, control of immigration, elections, highways, the census, and the like.

5. *Revenue.* The revenue or fiscal function embraces all the factual detail relating to the receipt and expenditure of money by the government.

6. *Operation.* The operative function is concerned with the factual management of lands, chattels, buildings, and permanent services, and the carrying into effect of powers under legislative delegation. It includes the operation of the post-office system, the mint, governmental publication, prisons, highways, public buildings and other property. Here, as elsewhere, the allocation of any particular activity is a matter of convenience. For example, Congress may prefer to manage the capitol instead of leaving the factual control to another department, but the activity would still remain operative.

7. *Administration.* This function embraces the activities of boards and commissions under legislative delegation. These boards and commissions commonly exercise legislative and adjudicative powers, but, in their legislative activities, they are always subject to control by the legislature, and, in their adjudicative activities, their acts are reviewable by the courts.

8. *Military Preparation.* This function includes control of the army and the navy, control of the instruments of war, and to a limited extent the making of military law and adjudication of military offenses.

9. *Representation.* The function of representation embraces all the activities of the government covering contacts of the government or of subjects

with foreign states or subjects, including ambassadors, consuls, and other foreign ministers and the negotiation of treaties.

§ 31. **Summary.** Factually, the State is a distinct kind of social organization having for its purpose the welfare of all the social elements under the control of the State. This power of control is known as sovereignty, and, as against all other forms of social organization coexisting alongside of the State, it is juridically ultimate. The factual method of control is by means of a government. The purposes to be attained by this political organization or society determine the form of the government. These purposes ideally are not only to be achieved but they are to be realized in the most effective manner possible to promote the welfare of all the social elements that constitute the substance of political society. Each species of social organization has ends of its own and the attainment of these ends determines the means or organization for attaining them. Political society seeks to harmonize the purposes of all other societies within its control by a criterion which advances the interests of society as a whole.

The purposes sought by political society are different from those of any other form of society. These purposes of political society require an organization in which the following functions will be separated: organization, legislation, adjudication, police, taxation, operation, administration, military preparation, and representation.

Political societies not only have purposes and necessarily, also, functions, which differ from other societies, but they require methods of organization especially adapted to maintain their own existence since a political society is in social competition at all times and at all points with other powerful societies.

If the balance is lost, the political society will come to an end and a new political society will replace it. The danger of loss of equilibrium may come from without or may come from within. Therefore, the chief interests of political society are in War and in Law—an organization that safeguards from external aggression and an organization that holds the internal social forces in harmonious contact.

In view of these predominant interests, the State requires such a distribution of power as will most effectually ward off the dangers that may threaten its existence. This is accomplished by locating the various centers of factual power at the points which have the greatest need for accomplishing the purposes of political society. The foundation problem of human government is one of harmonious organization of social forces. Such a harmonious organization of social forces depends on a reasonable regularity of the phenomena by which these social forces express themselves, and, in turn, regularity in the occurrence of social phenomena requires the idea of Law.

Social force is the primary fact and Law is the secondary fact. The State from which law emanates is juridically ultimate or sovereign, but this sovereignty, which, in the last resort, is manifested by the use of successful physical power, is simply the power derived from the social elements of which political society is materially constituted. There are limits in the scope of the factual power of political societies. It should be emphasized that political society is only one of many social organizations, and that it is in competition with all of them. Essentially, a political society is a form of social compromise of many diverse and often conflicting group interests. This is clearly manifested in the voluntary and arbi-

tral character of administration of justice in the early stages of development of the political State. While the State has succeeded in gaining factual power, yet, in the last resort, it still remains in essence an organized compromise of conflicting group interests.

The compromise nature of the State makes it possible to understand some of the characteristic features of State organization and also the shortcomings of its methods. Political society in all ages has had to contend with opposition against its power, and fear and mistrust of authority. The nature of the case may be clearly seen when political society is contrasted with private corporate organization. A private corporation is governed by a board of directors which has a general supervision and control of all the activities of such an organization. Some of these organizations in the United States are so extensive in their fields of operation as to rival the political State in the complexity of organization. A few of the larger of these private organizations no doubt are more important in their economic aspects and in organizative complexity than some of the smaller political societies. Yet, no modern enlightened political society with European traditions of government, has operated or can operate with the simplicity of structure of a private corporation.

A board of directors does not have a bicameral legislature; there is no separation of functions or division of powers. The aim of a private corporation is to attain its ends by the quickest means, limited only by the law which creates it and the articles which define its scope. The nature of a political corporation, on the contrary, is such that often in attaining its ends, it must adopt the most indirect, wasteful, and time-consuming methods. Most of

the evils of government could be solved if a political society could be modeled on the plan of a private corporation. It would even have an advantage in being free from the law. Government might then be efficient, but it might also be arbitrary.

The ideal of government in our time is to attain the highest standards of efficiency in the work of government, free from the risk of arbitrariness.

The fear of tyranny in government gave rise to the separation of powers. The theoretical separation in rule-making, rule-applying, and rule-executing has never been realized in practice, nor can such a separation be attained practically. In every form of government there must be a center of sovereign power. In England this center is found in Parliament; in the United States the sovereign center is found in the courts.

CHAPTER III

LAW AND ITS SOURCES

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| § 32. Political Law and Laws of Nature Contrasted. | § 38. Rule and Discretion. |
| § 33. Law and Morals. | § 39. Nature of Legal Rules. |
| § 34. Summary of Differences. | § 40. Sources of Legal Rules. |
| § 35. Reciprocal Influence of Law and Morals. | § 41. Interpretation. |
| § 36. Morals, Customs, and Law. | § 42. Law and Other Sciences. |
| § 37. State Control of Law. | § 43. Nature of Law. |
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§ 32. **Political Law and Laws of Nature Contrasted.** In the phenomena of nature there are discovered a large variety of approximations to an absolute uniformity of action under given conditions. Whether these uniformities are rigid for all phenomena of all kinds and in all of space is beyond our present knowledge, but in the fields of physics, chemistry, and mechanics, these uniformities for practical purposes are so constant that they are relied upon with assurance, where the conditions are subject to control and measurement. These uniformities are called 'laws' or 'rules' but they differ widely from political laws in various respects. Uniformity is not an essential attribute of the phenomena controlled by political law. Laws may be 'broken.' The activities of courts concern themselves chiefly with violation of law. The court-room is the operating chamber for legal abnormality. Legislation is called into being to a large extent to provide remedies against moral wrongs. The factor of the abnormal, the factor of moral wrong and illegal conduct, is the

one that occupies the government more than any other, especially where the State is modeled on the form of a Police State. In no aspect, can uniformity be said to be an attribute of political law, either in the observance of such laws or in the application of them. The laws of nature, on the other hand, are never frangible—they are mere uniformities which always follow the same conditions. If the conditions are changed, a new uniformity is manifested.

In one important respect, there is a similarity. The laws of nature and political laws both involve an imperative element. This is an attribute of all rules without exception, but the imperative quality of rules has many different kinds of sequences. The compulsion of a rule may rest on an intellectual, emotional, or physical sanction.

A rule has no meaning, as rule, unless it implies some measure of compulsion with respect to the facts to which it is applied. The laws of nature express an absolute imperative; the facts to which a law of nature applies, yield absolutely to the rule. But here, it may be noticed that we are dealing with figurative language. There is, of course, no proof of any rule or law of nature existing apart from the facts of nature. The phenomena of nature are phenomena and nothing more; they are not rules or laws; and there is no law to govern them. The so-called laws of nature are man-made constructions which attempt to chart the uniformities discoverable in these phenomena. The metaphor, however, is still useful, since it implicates the imperative element in rules. Some of the aspects of the imperative element in rules may be illustrated. There are rules of grammar to indicate the proper construction of sentences. In the strongest sense, the compulsion back of the rule is the fear of ridicule. In the weakest

sense, a rule of grammar may only point out a hardly distinguishable preference of usage. Here the compulsion of the rule is ordinarily very slight. Again, there may be a rule to govern the proper combination of colors in painting a house. Such a rule may be simply a matter of taste varying from one period to another. The compulsion back of it is no more than the risk of reaction of esthetic feeling in those that can experience such a feeling. This esthetic feeling may be shared by a few or by many, and it is also possible that there may be conflicting views on the same matter. Each view represents a rule, implying an 'ought' or 'must.' In such a case of conflict, there must be a choice of rules; one will be violated and the other observed.

In still another respect is there a similarity between the laws of nature and political laws. A law, in the proper sense, is an abstract rule. The rules of nature, also, in the sense of humanly constructed hypotheses of uniformities in natural phenomena are abstractions. A command given by an autocratic prince to a subject, is not a law. Sometimes, however, such commands are called 'laws.' When the legislature directs a given officer (whether named or not) to do an act (e. g. to pay money, to issue bonds, to receive bids, etc.) it is not legislating (i. e. is not making a rule of law) since the command, though creating a legal duty, can apply only to one or more concrete instances specifically contemplated. But the application of a command to one person by description of his office (e. g. governor, secretary of state, etc.) without reference or without exclusive reference to a specifically contemplated concrete instance or instances, is a rule of law. For example, a statute requiring the governor to present to the legislature each biennium a list of all pardoned and

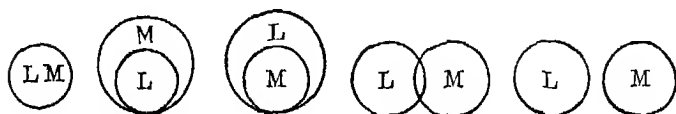
paroled offenders, is legislation (i. e. the making of a rule of law) since it applies to all governors in the future and to all pardons and paroles in the future. A mere command exhausts itself with one performance, but a rule, on the contrary, is inexhaustible. Such concrete commands may be issued in all departments of the government. The great bulk of them are purely informal and they do not take on a form except when issued by the legislature, since legislatures in modern times express their will only in the form of written enactments. Whether commands issued to inferior officers and employees in administrative activities (e. g. rules of civil service, rules for employees of the Treasury) are to be called laws (i. e. legislation) will depend on the breadth of the definition of law itself. It may, however, here be observed that the concept of rule or law does not implicate anything more than abstractness of application of the duty-act commanded; it need not apply to all subjects. For example, there are laws applicable only to officers, to certain officers, and even to a single officer. Other laws may apply only to persons in certain trades or professions or to certain special acts and activities. This touches again, the distinction already noted of fields of General and of Special law.

All rules, therefore, are abstract commands to do or to refrain, but not all commands are rules.

§ 33. Law and Morals. The relation of law and morals has been and remains a much discussed and highly disputable question. The difficulty here, as in many other controversial matters, has been that the problem has not been reduced to simple elements. To compare law and morals in the mass, without fixing upon the same element of measure, quantity, or

quality, as a standard of discussion, leads only to futility.

There are five possible forms of relation between law and morals which may be illustrated by the following diagrams:



In the first diagram, law and morals coincide; in the second, all law is included by morals; in the third, all morals is included by law; in the fourth, law and morals in part, coincide, and in part, differ; in the fifth, no law is any part of morals.

The term 'ethic' (ethics) is often used as a synonym for morals and the term also has other meanings contrasted with morals.

By way of a provisional definition, morals is the judgment of members of human society on the conformity of human acts to a standard from the point of view of the actor's mental life. Ethic is a system of ends by which the worth of all human conduct is measured. Moral judgments are emotional; ethical judgments are intellectual. Moral judgments change in time and in space; ethical valuations are a part of cosmic relations. An ancient philosopher has said "Fire burns both in Hellas and in Persia but men's ideas of right and wrong vary from place to place." This is a description of morals in contrast with Ethic. The words themselves at least suggest some such distinction. Morals in the Latin root word means custom; ethic in the root word signifies character. The one is a variable and the other a constant.

Morals is an unconscious convention, and is purely a by-product of human emotions reacting on a given social background. If polyandry, polygamy, the Levirate, infanticide, and like practices, have appeared in human society, the explanation is found in a collision of human wants and behavior with other wants and behavior, from which a practice or an institution arises as the product of a parallelogram of social forces. For a given political society, there is not one system of morals but there are likely to be many different systems in which certain ideas tend toward a general uniformity. Each economic or professional group has its own moral system; that is to say, its own reactions to what is considered right and wrong. There even may be an individual morality since the basis of morals is emotional reaction to conduct. The lawyer and physician classes probably maintain a more rigorous attitude looking to the protection and welfare of the client and patient than does a commercial class in dealings with customers. Smaller groups and individuals may even have different codes, sometimes stricter, and, at other times, more liberal, than the code of the general group.

Law and morals may be compared from various points of view: the *field* of conduct governed; the *method* of controlling conduct; the *attitude* concerning the same conduct; the *objects* sought in controlling conduct.

(1) The fields of morals and law are not coterminous. Using the term morals, as above defined, it would be difficult to say whether one field or the other is the larger field, but it is certain that the fields differ at least in part. Perhaps it is not a question of morals whether the rule of the road shall be to pass to the right or to the left, if it could be sup-

posed that custom has not already made a convention on the point. Assuming that there is no rule, perhaps it is morally indifferent what legal meaning shall be attached to the act of signing one's name on the back of a promissory note—whether the responsibility of the signer shall be that of a co-maker, an indorser, a surety, or a guarantor. But the difficulty is to find an act that is not already standardized by local or general custom or by particular custom. If a custom already exists, moral compulsion goes with it. Those who have contributed to the custom will believe it ought to be obeyed. Those who come into contact with it knowingly, will feel under compulsion to observe it. Such instances may suggest that, in practice, the actor's mental life as a standard of measurement of acts is not more important in morals than in law. The actor suffers moral condemnation of the group for what eventuates through him, without too much inquiry into his mental state. It is probable that the commonly accepted test of morals based on mental states is practically meaningless, and that little remains but a sense of moral conviction in each individual on the propriety of acts measured by a social standard. That would involve a distinction and a separation of one matter into two—individual moral conviction on one hand and morals (customary approval or disapproval of acts) on the other. But this does not furnish an answer to the question of the extent of the fields to be compared.

Sometimes, what is here termed morals is incorrectly identified with ethic. Taking the term in the sense of the definition proposed, all acts are within the ethic field. No act is meaningless or indifferent. All acts are to be tested by their agreement with the purpose of the universe. Even a rule of the road is not indifferent. If the greater number of human

beings now alive are right-handed, as is said to be the case, a rule to pass to the left may in connection with the physiological fact of right-handedness have measureable consequences opposed to the logical trends of a world process. Ethically, such a rule would *prima facie* be disapproved. From the ethical view that no act is ethically indifferent, it is clear that the field of ethics is a more extensive one than that of law and that it embraces it. The second diagram (above) represents the relation.

(2) When we consider the methods of law and morals in the control of conduct, it is clear that there is diversity. In morals, disapproval takes the form of exclusion, a vestigial outlawry. Outlawry was one of the earliest primitive methods of the political group in an age when morals, religion, deportment, and law had not yet been differentiated, and it now remains as the last resort of moral sanctions. The law has assumed jural supremacy over the use of physical coercion, and while the application of physical sanctions often is accompanied by moral disapproval of illicit conduct, yet moral disapproval never stands alone as a legal sanction. It sometimes occurs that a prisoner is discharged with moral disapproval uttered by the trier of the fact. This, however, is an extra-legal phenomenon explainable on the same ground as is the fact that the phenomena of nature are never presented in isolated forms of reality. From the standpoint of the specific sanctions used by law and morals, they are separate spheres.

(3) In the attitude of approval or disapproval of the same conduct, law and morals are intersecting circles. Some conduct is disapproved by morals that is approved by law. Some conduct is disapproved by law but is not disapproved by morals. Other con-

duct is disapproved both by law and by morals. A debtor now become wealthy and still in possession of a loan made from a debtor now poor, may after the lapse of a few years decline to pay the loan. The law supports the declination; morals disapproves it. A wealthy merchant may open a grocery store next door to that of a poor widow and by competition destroy the widow's only source of income. The law again does not disapprove; morals disapproves. To put a contrary illustration: a sick man stumbling along in a rain storm, by mistake walks onto the land of another. Here the law disapproves and will inflict at least nominal damages in an action of trespass. Morals holds the act blameless.

These instances no doubt can be multiplied, but for the larger part of human conduct what is disapproved by morals is not indifferent in law, and, on the other hand, what is disapproved by law is not indifferent in morals. The relations therefore are indicated by the diagram showing intersecting circles.

There are other types of case that better illustrate the respective attitudes of law and morals. *A* may have honestly acquired information leading to a certainty of belief that certain land will greatly appreciate in value within a short period because (let us say) a railroad is to be constructed near the land of *B*. *A* makes an offer of \$500 an acre (its apparent value) to *B* for his land, knowing that the land soon will be worth \$10,000 an acre. Should *A* disclose to *B* this information when communicating his offer? The law will answer in the negative. We can not with any assurance anticipate the result of a questionnaire on the answer in morals, but it is conceivable that *A*'s conduct would not be approved by various groups outside of those whose business is

selling land or merchandise or other commodities. Assuming a clean-cut division of answer (and cases easily can be put that will no doubt justify it) why this difference in attitude? Why should law and morals at any time be in conflict or even in discordance? There are various reasons. One is that the law must deal, if at all, by physical methods in applying sanctions; it must deal also in exact measures. Morals can utter its sentences emotionally and in indefinite meanings. In the case put, morals can say that *A*'s conduct is dishonest and look upon him thereafter with suspicion. It can have no reliable means even of ascertaining the facts. *A* may unjustifiably get a reputation for sharp dealings on the mere one-sided report of *B*. There is no accuracy at any point in the moral process. It lives and thrives in the atmosphere of emotion and is first and last an emotional reaction. If, however, all the facts can be known and are found to be as we have stated them, and if we add for a coloring of the background, that *B* is an honest, illiterate farmer sweating under the handicap of poor crops and the misery of a mortgage, why should law and morals diverge?

Another reason is policy. If there were a legal duty to disclose information that induces the making of offers, where can the line be drawn? Shall it be limited to land transactions? But why limit it to any type or types of dealing? Would not the same question remain after the limitation as to what remains? Whether we limit or whether we do not limit, is the rule requiring disclosure one that practically can be effective? Without attempting to enter into a detailed discussion of what is suggested by these questions, it is clear that law must attempt to be a governing method that can operate practically, with reasonable certainty in the foundations of its opera-

tions and in the results, and without disturbance of the normal currents of life. Law has been defined as a "minimum of morals" and if the description is accurate, it is a minimum of morals because a greater infusion of the moral element would defeat itself.

There is nothing irreconcilable between sound morals and sound law but what is sound in morals may not be sound in law because it can not be made effective in law. Since law must deal, as far as possible, with exact and measurable values, it must exclude the inexact and the non-measurable quantities that enter into human judgment. The usual type of moral question is too involved with all manner of subjective elements and diversities of behavior to afford a method that can reliably be used in legal operations. Moreover, the foundations of moral reaction are not rationalized and the nature of the moral judgment is such that it does not submit of rationalization because of its infinite complexity. Reliable results can not be attained on such a quagmire of uncertainty.

But this is not to deny the reality of moral judgments and the usefulness of these judgments. Law and morals always will be complementary fields. Just as it is desirable that questions of mere deportment be left to the members of society to regulate as they can and will, within the limits of law, so also moral judgments should and will remain one of the methods by which society will supplement the law.

(4) As to the object of controlling conduct, the point of view of law and morals is probably the same or very nearly equivalent. There is enough of similarity in the two spheres of regulation to make it clear that at one time the two were united and the

differences in method and of attitude point out the reasons for the separation.

§ 34. Summary of Differences. Law and morals differ probably to a certain extent in the field of conduct governed. Many acts are practically neutral in morals (but not in ethic) which are regulated by law. Some acts are subjects of moral judgment which are neutral in law. For example, in a time of disaster, the rich are under a moral duty to aid the destitute. But the law remains silent. The law does not enter the field of compulsory benevolence because of the practical difficulties of standardizing benevolent conduct and for the further reason that the subject does not imperatively require it. As the law now stands, a strong swimmer need not even make the slightest effort to rescue a drowning person. Physical sanctions are not always the most effective in controlling conduct, and it is, no doubt, one of the major policies of the law not to enter into fields of regulation that are already effectually standardized by other normative institutions.

Law and morals differ chiefly in their attitude toward the same conduct and this difference in turn is also a difference in the field of conduct. A given transaction may be valid in law and regarded at the same time as invalid in morals. Morals is much more flexible than law in its requirements of positive acts. This also accounts for the general absence of legal requirements of acts of benevolence. In the law, negative acts are typical requirements. Such negative acts are duties to respect another's corporal integrity, not to interfere with his family, dependents, agents, contracts, lands, and chattels. Where positive acts are required, they are due only because of special circumstances not specifically

applicable to other persons, such as contract duties, duties to restore unjustified benefits, duties arising out of domestic or fiduciary relations, and duties to render compensation for legal wrongs. In morals, on the contrary, there may be duties not only to those in business or family relations, but there may be positive duties to entire strangers.

This difference in attitude in Christian civilizations arises out of a solicitude for those physically or mentally defective and for those economically unfortunate. Morals especially favors these persons and in doing this at times conflicts with the attitude of the law. This may be seen at the point of the treatment of crime. The question of legal culpability is not measured by an individual standard but by a social standard. Likewise, in the field of civil responsibility, the measure of the law is absolute or arbitrary, while in similar cases, the attitude of morals is based on individual treatment of each case. If a debtor does not pay he is guilty of a breach of legal duty, but in morals if the circumstances are such that he can not because of uncontrollable misfortune meet his obligation he does not violate it. The law for the needs of society as a whole must operate with reasonable certainty, and it is plain to see that if moral considerations are to be taken as a basis of legal action, security of commercial transactions would disappear.

Another difference between law and morals which follows, is that law operates principally with rules, while morals, since it treats each instance as unique, can not operate with rules the application of which can be reliably predicted for cases in the abstract. Each instance is governed by its own facts and not by rules for standard applications. Any attempt to administer law on the basis of the individual justice

of each case would be destruction of the idea of law and so far as law controls the social fabric, would have profound effects on social life. It is of the nature of legal rules to fuse all questions of policy and all considerations of individual justice into an abstract formula. These formulas represent a kind of average of the human society upon which they operate. That average must not be so low as to discourage the competent nor so high as to oppress the incompetent.

Another difference between law and morals is that law, dealing as it does with conceptional formulas, is an intellectual institution while morals in its foundations is emotional. In solving a problem of conduct by legal method, the normal method is to abstract the facts of the problem, next to find a rule which embraces these facts, and, finally, to apply the rule. In morals, the normal procedure is perception of the concrete facts, emotional reaction, and, finally, certain consequent behavior. It will be observed here that resort to rules is a necessary part of the legal process while in morals resort to rules is never an essential factor in the process. The moral process, however, in course of time imitates the intellectual methods of the law, but yet its essential emotional nature never changes. There are now somewhat elaborate "codes of ethics" for various trades and professions. The Ten Commandments also was a codification of moral law. Such a creation of intellectual standards tends to affect the factor of emotional reaction and may control behavior. Since the emotional factor is basic and predominant in the moral process, and since each instance will be judged on its own facts, any intellectual standardizing of conduct will fail except so far as it accurately coincides with and expresses the direction of the natural

emotional reaction. A codification of moral conduct will more quickly fall into desuetude than a code of law. This divergence between fact and rule will accelerate in the ratio that a moral code attempts to embrace the detail of individual instances. The emotional factor is the creative element in the moral process and it does not submit to codification or confinement by rules. So far as codifications of conduct are employed by trades, associations, and professions, they are simply controls of behavior which have emerged from a moral basis and have taken on a legal or quasi legal form, where the process is consciously the employment of rules as an intermediate lever of operation, as a substitute for the direct use of moral sanction applied to given conduct.

Finally, as a difference to be noted, is that the subjective element is or may be an important factor in moral judgments, while in law the present situation and the tendency is to base legal judgments on objective facts to the exclusion of mental facts. If a debtor could show that he innocently forgot the maturity day of his debt and did not pay, he would be accounted morally blameless but the law would say that he had violated his legal duty.

§ 35. Reciprocal Influence of Law and Morals.

We have seen that in its pure form morals is an emotional reaction toward conduct. Emotional reactions are inescapable in human nature, and they little submit to control by the reasoning faculties, so long as the causes which bring them into being remain the same. Buckle has observed that in a period of two thousand years of recorded history there has been little evidence of any progress whatever in morals alongside of the tremendous advances in technical power over the forces of nature. This

has a bearing on legal institutions and serves to explain the laggard steps of early law in gaining control over private vengeance and the remedies of self-help.

The subject matter of law, in its larger outlines, is the subject matter also of morals. Moral control came much earlier than law and since law may be said to be a derivative of morals it is understandable that except so far as the specific nature of the legal process of itself requires a difference of attitude toward conduct, the law would tend to follow the views of preponderant groups. The result has been that moral views have always influenced the law. It is inconceivable that the law could successfully function if it were at all points entirely alien to moral feeling; if, in other words, all moral ideas were exactly reversed in law. On the other hand, law has influenced morals. This is true even though the emotional basis in morals can be little affected by intellectualism. This influence has come in the behavioristic expression of moral emotions. In the first stages of moral development there was no check on the expression of moral emotion except the competition of other moral emotions. The modern practices of benevolence, forgiveness, mercy, honesty, truth, and similar virtues, are additions unthought of in primitive morals. But the same individual selfishness that reacts to harms inflicted on the individual by others, also generates the sentiment of altruism. Each one is a fair judge of the moral value of acts of second persons that bring harm to third persons, but this is only a reflex selfishness cloaked as altruism where the individual now perceives himself at once as the actor and the person upon whom the act falls. The roots of moral sentiment are sunk in the profoundest selfishness of

animal nature. The altruistic reflex would not of itself have done more than to assist in standardizing moral behavior upon a livable basis. The regeneration of moral behavior came from without, chiefly from religion, and next, in importance, from law.

§ 36. **Morals, Customs, and Law.** We have attempted to distinguish between emotional reactions toward conduct and the behavior that follows such emotional reactions. This external behavior in time becomes standardized and is followed as the norm of action. In this form it is known as custom. Custom follows moral judgment and precedes law. Custom in the earliest times is a substitute for law. Custom, however, in a heterogeneous society, is a highly defective form of law. In a clan state, only, does it appear in its most perfect form. In a confederation of clans there will appear at once, at various points, the clash of one custom with another, and then it becomes necessary to find a means of adjustment of these rivalries. The clan feud can not continue after a confederation without constitutional risk of wrecking the government. Law then emerges for the first time in an effort to compose the differences of conflicting groups. Its scope at first is the narrowest. Its successive steps are voluntary submission of disputes with power of withdrawal from arbitrament at any stage, the development at length of a composition system, voluntary submission without power of withdrawal, and at last a limited compulsory system of arbitrament. All of these stages of growth are characterized by a wealth of formalism which serves the purpose of diverting the litigant from measures of physical force by substituting a ritual which calls into action the powers of mental cunning and cleverness. Phys-

ical force becomes sublimated in an intellectual combat.

The first aim of the States was peace among its subjects, and law was an invention to reach this end. But once the instrument was developed, it went far beyond the purpose of its creation. First used to prevent internal disorder for wrongs already committed, it was an unconscious step to make rules that would tend to prevent internal disorder. All early law is chiefly occupied with those fields that are today called torts and crimes. All else was left to custom but since custom originally is merely crystallized habit fortified by moral pressure, and since the evidence of this custom often was doubtful, the need became apparent of supplying its deficiencies. The adjudicative function was the first to appear, and then, later, the legislative function of the State. Today, in all civilized States, nearly the whole field of custom has been superseded by law.

In various respects, custom always has been, is, and will continue to be, very important. It has universally been the starting point of legal systems and has furnished a large part of the groundwork of legal rules. But even in modern law, where resort is made not to custom directly, but to rules of law, there are still two ways in which custom continues to play an important part. The first is in the application of law. Legal rules are not translated into action without the modifying influence of custom. It is a problem of legislative mechanics how far a legal rule can be effective as against custom. There is abundant evidence that much legislation fails at this point of collision.

In another way, custom is important in that large areas of legal rules in any system of modern law are not definitive rules, but depend on custom.

Some of our most important legal ideas are of this kind; for example, the ideas of good faith, due care, fraud, estoppel, and many others. As to these ideas, the process of legal growth is one of negative intrusion. The law does not attempt, for example, to say what is good faith or fraud, but limits itself to declaring in specific instances that such and such conduct is or is not within the field of reference. Except in equity procedure, these questions are typically questions for a jury and not for the professional judge. The only part of the judge as to such questions, in reviewing the judgment of the jury, is a negative one. In exceptional cases, the judge undertakes to say, contrary to a jury's findings, that given conduct is not negligent, fraudulent, etc. There is, as to such questions, constant interaction in judicial procedure between the customary element and the rational element. These ideas, when custom and popular views are controlling, or, if not controlling, at least influential, are sometimes contrasted with definitive legal rules under the name 'standards' or 'safety-value concepts.'

§ 37. **State Control of Law.** In the early form of the State there was jural sovereignty without enacted law. Custom took the place of laws. It is not essential in the nature either of the State or of law that the State declare the law or that the State even by its own force inflict sanctions for violations of law, if these functions can be carried out by the subjects of the State with the jural recognition of these functions by the State, and, in the last resort, the intervention of the State to guarantee the regularity of their operation. The early State left the greater part of the regulation of conduct, including sanctions, to the subjects of the State or to special groups.

The slow process of taking over the law functions as a monopoly of the State is well illustrated in the English judicial system. With the Norman Conquest the administration of justice was centered in the *Aula Regia*, but other jurisdictions remained, and various new ones of a local or private character were created. Among these were the courts of *Piepoudre* (with jurisdiction of market law), the *Court Baron* (controversies concerning land, debts, trespass), the *Hundred Court* (an enlarged *Court Baron*), *County Court* (debts under forty shillings), *Courts Christian* (Church matters, matrimonial causes, testamentary causes), *Court of Policies of Assurance* (Insurance causes), and the *Stannery Courts* (suits by and against tanners). Even in the present day, the State in various ways relies upon non-official persons and groups to create the details of legal standards, as, for example, when admission to the bar is put under the control of a bar association. The common law jury also may be instanced as an example of the reliance of the State upon private persons for the administration of law.

In early law, self-help was the prevailing practice. The State's executive power in the field of private law was weak. Even up to the time of the Empire, in Rome, there was no organ of executive force to carry out judgments in private litigation and even the process of trial until a late period of Roman history was in the hands of non-official justices from whose sentences there was no appeal. In modern times, the power of executive self-help has not entirely disappeared. The landlord's power of distraint is a clear survival of a once common practice. Other instances of private intervention in the protection of public and private rights which still persist are the private power of arrest, power of

recaption of goods, defense of self and dependents from corporal harm, relief by physical force against trespassers, and power to abate nuisances. Other instances of self-help, not involving use of physical force, are powers of rescission of legal rights, forfeitures, and private service of judicial process.

In the field of the creation of concrete rights, especially, the State must, and does, rely entirely on the initiative of private persons. The State declares the rules concerning contracts but leaves to private persons the detail of what concrete rights shall be created. Likewise, it creates or permits the creation of associations with the power of legislating the rights of membership. The rules of these associations are binding on dissentient minorities. The State also delegates to various municipal groups power to create local legislation.

On the other hand, the State assists private persons, in various ways, in establishing the evidence of their privately created rights, in advising them what their rights are, in giving official recognition to otherwise valid acts, in administering estates, in officially declaring rights. These are prophylactic functions of government. Among abundant instances of these prophylactic functions may be noted, the institution of registry and deposit offices, declarations of rights in non-contentious procedure (as, for example, directions to an administrator, guardian, or receiver), legitimation, authorization of change of name, and official appointment of assignees in insolvency, administration of estates in probate, receiverships, etc., and decrees of foreclosure, forfeiture, and nullities.

§ 38. Rule and Discretion. Law is administered partly by rule and partly by discretion. This fact is inescapable in the present state of legal science.

The fact is especially true in Anglo-American law, the greater bulk of which is the work of the courts. Since our legal system began with only a background of custom to light the way, it is clear that the great mass of legal rules that have accumulated were created by a discretionary process in the cases to which they first were applied. The development of our law has been largely by means of *ex post facto* applications of rules. Cases arose, and if no rule was found to fit it, the court tacitly or implicitly made a rule to govern it. In the present day, when adjudications may be found for nearly every conceivable kind of legal problem, it would seem that the field of discretion had been narrowed to a minimum, and that nothing remains except to discern a rule already made by the courts and then to apply it.

Whether the field of discretion has even been substantially restricted by the great mass of case law is at least doubtful. That the field of discretion has been narrowed to a minimum is clearly contrary to the fact. There are various reasons which keep the principle of discretion afoot as a vital factor in the administration of justice.

(1) Anglo-American law is still in nearly every department of it, actively exhibiting the phenomenon of unconscious development. General rules are being modified constantly in concrete applications. The general structure remains substantially unalterable or gives the appearance of rigidity, but, in detail, the whole organism of law is undergoing at all times minute changes, which, in time, modify the structural form. Our legal system in its general appearance may be roughly compared to the celestial constellations. These constellations have the same appearance today, at a distance of many light years, that they had at the beginning of recorded history

although we know that all astronomieal bodies move at a velocity of 1000 times the speed of the most rapid railroad train. The legal establishment is one of such vast proportions that even the contact of specialists in the work of applying law is insufficient to give a clear perspective of the developments that are occurring.

The extent of these changes could best be understood if a detailed comparison were made of the law as it now stands with the law as it stood a generation ago. Such a comparison in detail even for one of the institutions of our law probably would exceed the power of any single individual and a more narrow base of comparison would be necessary for an accurate survey. But some notion of the extent of these changes can be gathered by a comparison of different editions of standard text books. A logic treatise today will be antiquated in twenty years, and, in some rapidly developing fields, a logic treatise will become obsolescent in a few years. To a certain extent, the changes will indicate merely accumulated precedent fortifying legal rules. Other changes will indicate logical developments of rules resulting in creation of many new and more detailed rules. Other changes again will point out entirely new departures and a total or partial decay of old rules.

(2) Another reason for persistence of the discretionary element is that for any given jural sovereignty, the whole field of law in the form of legislatively stated or judicially declared rules is never complete. The great bulk of these rules have their origin in adjudications by courts, and the limits of their application are always doubtful, since a rule created by the adjudicative process does not have any controlling force beyond the class of facts which

called it into being. The rule itself does not isolate these facts and opinions may differ as to how much of the fact situation is to be generalized for future use. Again, the adjudication may not even be based expressly on a new or old formulation of legal rule. In such case, the rule must be extracted from the precise facts adjudicated, and here again opinions will differ on what the rule is actually. Much of the labor of lawyers and judges is expended in an effort to state the actual rules out of case materials. The actual decision, in each such case, simply adds new material of the same ambiguous meaning. The chief reason for this endless process is that it is the chief function of courts to apply rules and not to make them, and even when a court makes a rule the case calling for its application, so far modifies the range of application of the rule itself as to make it little more than a rule for a particular case.

(3) Not only is the field of law never completely covered, requiring either new application of old rules in various forms or applications of new rules, but the nature of judicial rule-making is such that the very growth of the number and variety of legal rules designed for particular cases probably tends somewhat to the growth of discretion. This accumulation of case material also gives in an increasing degree the occasion for logical departures and contradictory results. This intensifies the discretionary element. When it is recalled that our common law was not in substance a new creation but that it began in judicial declarations of what already was expressed in custom, it is an illusion to suppose that the factor of discretion is less today than at the beginning. Qualitatively, discretion has changed; originally its guide was custom; today it is judicial

tradition. Quantitatively, the range of discretion has increased in large proportions.

(4) A considerable portion of what we know as legal rules are cast in the form of discretion. Examples of such rules are those casting duties on judges of courts. They are under a duty to act but not in general under a duty to act in a predefined way and the only limits upon the performance of such duties are the limits of arbitrariness, which, in large part, lie in the discretion of appellate courts.

§ 39. Nature of Legal Rules. A legal rule is an abstract command to do an act with a threat of sanction. Acts may be positive (e. g. to tender payment of a debt) or negative (e. g. to refrain from corporal harm of another). Negative acts are commonly said to be prohibited acts, but, clearly, they are also commands i. e. to do negative acts.

Commands. A command is implicit in every legal rule, but modern law is not cast in the molds of ancient legislation which typically was in the form of commands and prohibitions. Commands, therefore, are rarely found even in criminal law. For example, in a criminal code opened at random, we find on the subject of larceny, first a definition of larceny, and then a statement of the punishment for conviction of larceny. There is here no direct command not to steal; there is not even an express duty not to steal. The only provision imposing a duty is found in the words "shall be imprisoned" which is a duty cast on the government and not on subjects. The literary form of legislation little indicates, in express terms, the existence of duties and yet, without them, legislation would be jurally inoperative for want of a jural content. The great bulk of the legal rules of our system are to be extracted from reported cases where

decisions are stated on past states of fact. These decisions clearly can not impose duties on the parties to litigation to act in a given way concerning the matters in dispute, since these matters of conduct are now beyond control. The court can and does prescribe what duties are now due owing to past conduct, but the important thing is the rule for the conduct itself; that is to say, conduct of the kind which an adjudicated case presents. This rule is never implicitly stated and must be derived inductively from the conduct of the court itself (i. e. the decision) with such light on that judicial conduct as the court's own statement of reasons affords.

Duties. A formula that may be applied to the form of the law as evidenced by legislation or by judicial decision is: If (a certain state of facts appears) Then (a certain result shall follow). In this formula a duty in express terms may be entirely wanting and where a duty is stated, or may be directly implied from the language, the duty is rather of the courts or public officers to pursue certain measures upon hypothetical facts. The duty of private persons with respect to the hypothetical facts may be, and usually is, wanting in express terms, although that duty is the primary object of the rule. Therefore, it is necessary to look beneath the mere form of any legal rule to ascertain its jural substance, since a rule can have no meaning unless it involves the idea of a duty to act in a definite way and a command so to act.

Elements of legal rules. A legislative declaration is incomplete unless it includes either in itself or by reference the following elements: (a) an act to be done; (b) a command to do that act; (c) a sanction for disobedience. The first two elements may be

combined into a single idea of duty, so that a legal rule will include simply the elements of (a) duty and (b) sanction. But it must be remembered that duties are not always clearly ascertainable in advance. Very commonly, the answer to the question of whether a duty exists and the scope of it, can not be reliably known until the question is litigated. The duty element of legal rules is sometimes called the Hypothesis and the sanction element is called the Disposition. The Hypothesis element of legal rules involves the *duties* of subjects; the Disposition element involves the *powers* of the government. If a certain duty act is not done as was commanded, then the government may inflict a sanction. Thus, legal rules also have the two elements of (a) duty and (b) power.

There are also other legal rules imposing duties on the government to inflict sanctions in proper cases, but these are independent legal rules and they submit to precisely the same analysis. For example, it is the duty of the judge to award a money judgment in a case litigated in favor of the plaintiff who has proved himself entitled to have that judgment. If corruption enters into the judge's refusal to act as his duty requires, he may be impeached and removed from office. If the refusal is due to mistake, there is still a sanction. A court of appeal will reverse the judgment. If the judge refuses to act at all, he will be commanded to act by a superior court. In the supreme organs of government, such sanctions to control discretionary acts not colored by corruption are not so obvious but they exist even there. An explanation of this point will be attempted later. If there is a legal rule, therefore it has as essential elements: (a) hypothesis duties and (b) disposition powers.

Forms of legislative declarations. Legislative declarations differ in form; they are (a) preliminary; (b) definitional; (c) explanatory; (d) corrective; (e) abrogative; (f) permissive; (g) potestative; (h) directory; (i) definitive.

(a) Preliminary declarations are illustrated by preambles to legislative acts. They may state the conditions which suggest the creation of new legal rules, evils to be corrected, and ends to be attained. It is entirely clear that preliminary legislative declaration, standing alone, falls short of creating, modifying, or abrogating legal rules. As a declaration it is merely a preliminary to a further declaration.

(b) Definitional declarations also have a preparatory function; they give the meaning of the words and phrases in another connected legislative declaration. Standing alone, they would be inoperative to affect legal rights for want of reference to legal rules. For example, the federal bankruptcy act embodies various preliminary definitions of terms which appear in the ensuing text. Thus a 'judge' is defined as the judge of a court of bankruptcy and does not include a referee. If these definitions had been adopted by Congress without the remainder of the act, they would, of course, have been inoperative.

(c) Explanatory (usually called declaratory) propositions are those referring to previous legislative acts. Their purpose is to make clear the legislative meaning where doubt has arisen. American courts hold such declarations of meaning to have only a prospective operation, if a prior judicial declaration stands opposed. In a somewhat wider sense, the legislature might make a legislative declaration, for example, of the State's public policy without reference to other legislative acts. Explanatory statements therefore may be (a) special, hav-

ing reference to some specific act of legislation which is officially interpreted by the legislative organ; or (b) general, having reference to rules of law not formulated by the legislative organ.

(d) Corrective declarations are abundantly illustrated by amending laws. Explanatory statements are made when doubt has arisen as to meaning or scope of legal rules. Corrective declarations are made where the meaning is not doubted but where the object is to change the rule already made. Corrective declarations usually operate on prior legislative formulations of legal rules. They may also operate on prior legislative explanations, definitions, corrective statements, etc. They also may operate to change rules formulated by the courts in litigation. Thus a common law rule may be changed by legislation.

(e) Abrogative declarations operate to destroy legal rules, leaving the legal situation as it was in all other respects except as the fact of abrogation of one legal rule affects others that remain. The fellow servant doctrine, for example, was a creation of the courts and the legislature might abrogate it. In that case, the effect would be to extend the scope of responsibility; masters would owe duties not to cause harms to employees through the negligence of co-employees. In such a case, what effects an abrogation of one rule also operates to correct another. But there are instances of abrogation which do not operate correctively. If, for example, a certain type of crime is deleted from the criminal law, the range of legal responsibility in the subjects of the State is not increased. The only jural effect of such abrogation of law is, at the most, to cast a duty on the government not to prosecute persons for acts done which fall within the description of the former

crime. In these respects, abrogative declarations have an imperative character. Therefore, such abrogative declarations operate either: (a) to increase jural responsibility or (b) to increase jural exemptions.

(f) Permissive declarations are more commonly found in the rules of law formulated by courts than in those formulated by legislatures. In a code of laws, they are likely to be very numerous, since it may be of advantage to state not only what facts create jural relations but also what facts do not create jural relations. Thus, it may be declared that an offer of contract will not be treated as accepted because of acts of silence of the offeree, even where the offer in terms states that a failure to reject the offer will be regarded as an acceptance binding both parties. Such rules, if declared by a court or by a legislature, would in essence be either a limitation or abrogation of other related rules and would therefore fall into one or more of the groups already discussed, or, if not logically related to other legal rules, would be binding on the government; that is to say, binding the courts to make application of the rule. Declarations which are limitations or abrogations of other existing legal rules are not in strictness permissive declarations although they have certain features of similarity to them in their jural effects. In strictness, a permissive declaration is one which does not correct or abrogate a legal rule and which also does not create any duties in subjects. The example above given of a legislatively deleted crime has the last feature of the distinction (it creates rights not to be prosecuted) but it fails the first test (since it is an abrogation of a criminal statute).

(g) Potestative declarations create jural powers. Powers may be created (a) with related, accompany-

ing duties or (b) without related, accompanying duties. For example, the law creates a duty not to invade the land of another and also creates a power in the landowner to expel intruders. Here the power is accompanied by duty. The power to put off is related to the duty to stay off the land. Again, a sheriff may owe a duty to make a levy and he also has the power to make the levy. In this instance, the duty act and the power act are equivalent. Again, the owner of a chattel has the power to offer the chattel to another as a gift. In this case, there is no accompanying duty to make the offer. Again, the law may recognize a power in the owner of a chattel to abandon it so that it becomes a *res nullius*. Here, also, there is no accompanying duty.

Much difficulty has been experienced by jurists, even in recent years, in understanding how a permissive declaration (above discussed) can be regarded as a legal rule in the strict sense already indicated of a hypothesis duty and power disposition. The explanation given here was that permissive declarations created rights in subjects and duties in officers of the government. Potestative declarations present the same juristic problem but the solution is different. Where the law creates a jural power (e. g. to offer, to accept, to appoint a title, to remove a trespasser, etc.) where are the elements of a legal rule as we have stated them? The problem will best be understood by considering a concrete instance. The jural power to abandon a chattel will be one of the best that can be selected. There is no duty either to abandon or not to abandon the chattel. Standing alone, there would seem to be no jural consequences attached to the act of abandonment other than destruction of rights of ownership in the chattel. We are now driven to say that declarations, creating

powers are not legal rules in the sense of the definition or, in the alternative, that declarations creating powers are of the same order as explanatory or definitional declarations; that is to say, that they are incomplete statements of legal rules. The latter alternative seems to us the correct one. The effect of abandonment of a chattel can be raised in two different ways. Another person after the abandonment may use the chattel temporarily, or another person may occupy the chattel with continuing possession. If, in either of these instances, the original owner is non-suited in an action of trespass or trover, there is jural proof of loss of ownership. If an action against a new possessor is unavailing there is jural proof of ownership in the new possessor. Potestative declarations, therefore, are incomplete declarations of legal rules. The efficacy of a jural power is tested by a jural-duty which follows the exercise of it. The duty is one of the essential elements of a legal rule, and the power is simply one of the conditions of the existence of the duty.

(h) Directory propositions are those which (i) point out alternatives (e. g. power to fine or imprison); (ii) indicate the limits or measure of action (e. g. power to imprison not exceeding a given term); (iii) indicate an object to be attained without pointing the means (e. g. duty to exercise reasonable care); (iv) indicate a general act to be done without pointing out its specific content (e. g. duty of a judge to sign a bill of exceptions).

(i) Definitive propositions are those which are complete statements of a legal rule leaving no doubt as to the person who owes the duty and precisely stating the duty act to be performed, the circumstances under which it is to be performed, and the consequences with like definiteness of failure to per-

form. Separate classes are possible for definitive duty hypotheses with indefinite power dispositions and in reverse, but examples of either of them are probably rare. Definitive propositions complete in the statement both of the duty act and the sanction are still more rare, especially in modern law. Definitive propositions are limited to positive acts of duty (e. g. duty to tender payment of a definite sum of money). Definitive propositions stand in contrast to directory propositions which are indefinite as to the duty act.

Imperative character of legal rules. It will be observed, and, especially by those familiar with the literature of theoretical jurisprudence, that the above enumeration omits the class of imperative declarations. The omission is based on the proposition that all legislative declarations, if they are complete, are imperative involving in essence a duty and a sanction. Incomplete legislative declarations are simply incomplete imperatives. They are of no jural importance unless, as linked to other connected declarations, they make out an imperative consisting of a duty and a sanction. For example, the legislature may define false advertizing; it may then declare it unlawful to publish false advertizing; but if the statute contains nothing more, no criminal punishment could be inflicted. Such a statute would add nothing new to the law of unfair competition and it would fail to create a new species of crime for want of a sanction. The form of an imperative declaration is immaterial. In modern law an imperative in complete form must be pieced together out of many fragments. The imperative element of duty is generally unexpressed.

Imperatives on the other hand do not always issue from the supreme organs of government. Here,

again, the matter of form is immaterial. Only a small part of the sum total of the legal rules in vigor in a given territory are in the form of even direct legislative statement, and fewer still, even in criminal law, are in imperative form. Many of them, when formulated, proceed from inferior organs of government, and many of them, in our system of law, lack definite, literary formulation. The word 'command' is not to be understood in the anthropomorphic sense of imperative words of the Sovereign. The sovereign, as we have seen, is purely a jural concept, and, manifestly, concepts cannot issue commands. The jural essence of the matter is that there is an ultimate jural authority to which reference can be made for the regulation of human conduct. Whatever the form or method by which such regulation is factually accomplished, it is reducible to conceptual formulas of an imperative nature without which imperative character, legal rules would have neither logical nor practical meaning. It is astonishing to observe the effort that has been expended in a literary way to impeach the Austinian theory of law. The criticisms that have been leveled at Austin's theory of law either misconceive or ignore the distinction between form and substance of legal rules, or else they put in the place of the conceptional sovereign, as the ultimate point of reference of the jural authority of law, society itself.

Legal rules are abstract. A command by a judge to a clerk of court to enter a certain order, an order to a sheriff to levy an execution, a decree commanding a party to litigation to pay money, instructions to a jury to find a verdict, directions of a superior in an administrative office of government to a clerk to do a ministerial act, etc.—all these are examples of commands; they also are supported by authority,

and, in various ways, they involve some detriment if the command is not obeyed; but such commands are not legal rules. Every legal rule involves a command, but not every command supported by the authority of the State is a legal rule.

A specific command is not a legal rule. Such a specific command may issue in conformity to a legal rule; that is to say, a legal rule may authorize it or even require it; but a specific command exhausts itself when it is uttered. A legal rule, on the contrary, may have repeated applications. A rule may be made in economic life to govern repeated acts of the same human being, but in the law, rules are not made for particular human beings but rather for an average type of human being. A legal rule, therefore, has two qualities which differentiate it from specific commands: (a) it may have repeated applications; (b) it is abstractly applicable to all persons, present or future, unless they are excepted by other rules. There may be legal rules which can only apply to a single person at one given time. Thus, the president owes certain duties. The rule, however, is abstract because any qualified person may be the president, although only one can be president at a given time. Legal rules do not have a uniform factual application. The legal rule that upon a loan of money, payment must be tendered, applies abstractly to persons in general (except those excepted by other rules; e. g. infants) but the rule can have a factual application only to debtors.

Kinds of legal rules. Legal rules differ in completeness or incompleteness as conceptual formulas, as has been shown. They also differ in another important feature—their degree of abstractness. The concretest manifestation of a legal rule is its application to a given person under an actual state of

facts then present, in the form of a specific command. The lowest abstract form of a legal rule is the abstraction of all the elements essential to such a concrete application. Not all the facts in a given situation are logically essential. When, for example, a given debtor is adjudged to pay his creditor a given sum of money, few only of the great multitude of facts which are presented are legally essential. Thus, the creditor's or the debtor's stature, or other physical qualities, his ancestry, his social position, his habits, his economic position, etc., etc. are logically irrelevant. Another concrete application will present differences in the non-essential facts, and probably also, differences in the essential facts. Other applications will multiply the differences in the essential facts.

These essential differences may be isolated and arranged into classes and the classes may be arranged, at least theoretically, into subaltern genera. There can be no summum genus of legal rules and it is open to doubt whether legal rules as such admit of any reliable arrangement into logical forms higher than classes. Any such generic statement of legal rules would require for each statement numerous exceptions and qualifications. No systematic attempt seems to be recorded to realize this idea, and it would also appear that, if carried out, it would be not simply of interest but also of considerable value. In part the idea has been realized for classes of rules as to specific subjects. Some well-known examples are the case-book summaries of Ames, Beale, and Wigmore.

Tradition itself, tends to develop generalizations of legal rules and there are available, usually in a highly unsystematic form, a multitude of principles, maxims, proverbs, brocards, and notabilia. All

these are generalizations of legal rules, but they differ widely in form and it is not easy to separate them into classes except on a rhetorical basis.

Following are some examples of these generalizations:

Nemo plus juris ad alium transferre potest quam ipse haberet (one can not grant more than he has); *Unicuique mora sua nocet* (one must suffer the consequences of his own delay); *Nemo ex suo delicto meliorem conditionem suam facere potest* (a wrongful act does not improve one's legal situation); *Quod quis ex culpa sua damnum sentit non intelligitur damnum sentire* (No one can complain of a harm to which he consents); *Locus actum regit* (the law of the place governs the act); *Actus non facit reum nisi mens sit rea* (an act is not culpable unless accompanied by a guilty mind); *Cuius est solum eius est usque ad coelum* (the owner of the surface owns to the sky); *Invito beneficium non datur* (no one can be made a beneficiary contrary to his wishes); *Qui facit per alium facit per se* (one who acts by another himself acts); *De minimis non curat lex* (the law disregards trifles); *He who seeks equity must do equity*.

A distinction made by Pound may be noted between the terms 'principle' and 'standard'. A principle is a generalized rule (e. g. no liability without fault). A standard is a rule with an external measure (e. g. duty to use due care, to provide reasonable services at reasonable rates). A standard is not a generalized rule; it is an indefinite one. Standards, however, after a time, when numerous applications have been made of them, become generalizations of the rules implicated in these specific applications. A principle begins as a generalization; a standard ends as a generalization.

A distinction also must be observed between generalizations of specific legal rules and juristic generalizations. Generalization of rules is sufficiently illustrated by maxims (pithy generalizations), brocards (alliterative, rhymed, or metrical generalizations) and principles (simple generalizations). A juristic generalization may be illustrated by the following series: (i) a specific contract (relation); (ii) contract (relation); (iii) obligation (relation); (iv) polarized relation; (v) jural relation. Taking the same example from the standpoint not of the relation but of the cause of it, we have: (i) contract (act); (ii) agreement (act); (iii) valid act; (iv) act; (v) fact. Thus summing up the illustrations a specific contract relation is a polarized jural obligation relation. A contract act is a valid fact, agreement, promissory act. Juristic generalizations are not concerned with a rule content, but deal with the formal structure of ideas by which legal rules are made intelligible. At the nodal points of a juristic classification are found the leading legal institutions such as contracts, torts, quasi contracts, quasi torts, etc., etc. These legal institutions embrace the sum total of the legal rules governing the subjects represented. These institutions in turn are generalized into higher juristic forms. Thus contracts, torts, quasi contracts, and quasi torts fall into a larger grouping called obligations.

§ 40. Sources of Legal Rules. The term source is one of many possible meanings. A source of law is as difficult to find as the source of a river, as Gareis has pointed out. The source of a river may be thought of as the ocean, rain-clouds, mountain streams, springs, the shape of the river bed, gravi-

tation, the sun, etc. The term is not less difficult in the law. A legal source may mean any one of the following things: (i) the ultimate jural authority of a rule which is in the State; (ii) the sum total of the social forces (including State force) which support legal rules; (iii) the immediate fact, cause, occasion, or influence which brought a rule into existence; (iv) the ultimate fact, historically derived, which made the way for the specific creation; (v) the organ by which or through which the rule came to expression (e. g. court, legislature, executive, society); (vi) the monument (if any) of expression of legal rules (e. g. statute, judicial decisions, compilation of customary law).

The term 'source of law' can not usefully be employed where this multiplicity of meanings is possible. Ambiguity may be avoided by prefixing a descriptive term to indicate the meaning intended. By this method, we may distinguish the following kinds of sources of legal rules:

(1) *Jural source*. The jural source of all legal rules is the jural sovereignty of the State. The same meaning is expressed (after Salmond) by Formal source.

(2) *Official source*. The official source of legal rules is the organ or agency of the State which formulates them or gives them official authority. Such sources are the legislature and the courts. If the rules declared by administrative boards and commissions are legal rules, then such boards and commissions also are official sources. The term 'official source' may also be applied to the product of these organs and agencies. The term 'official source' would not be applied to the creation of the substance of legal rules by other than official agencies even where such rules are regarded by the

State as of equal authority with other sources. The only example of this kind which raises any question is customary law. Where customary law is recognized as a direct source of law (e. g. in Civil law) it may be called an officially recognized source in contradistinction to the official sources.

(3) *Literary source.* The literary sources are the original or other authorized records used by the organs and agencies which are official sources (e. g. legislative journals, statute books, reports of decisions). The literary source of legal rules may be either official or non-official. If, for example, an Illinois statute has been copied from a similar New York statute, the non-official literary source of the statute is the New York statute book, while the official literary source of the statute is the Illinois statute book. Non-official sources are sometimes called historical sources. Again, if a rule of law is adopted by a court from a commentary, the commentary is the non-official literary source, and the printed decision is the official literary source.

(4) *Causal source.* Causal sources are the social, intellectual, economic, or political facts, conditions, and influences which generate legal rules. Thus Gareis says that the "starting point of a legal rule is the necessity for legal order." This necessity is a causal source.

Official sources of legal rules. This is the only one of the enumerated sources which requires detailed discussion. An official source is an official organ or agency of the State. In another sense, it is the rule making of these organs and agencies. In general the official sources in all civilized States have been the same, but there have been various departures from this general uniformity.

In Rome after the Twelve Tables the legal sources were: (1) legislation consisting of *leges*, *plebiscita*, and *senatus-consulta*; (2) custom; (3) edicts of magistrates; (4) *constitutiones principum*, and (5) *responsa prudentum*. In the modern period after the reception of Roman law in Europe all of these sources had fallen away except the first two—legislation and custom. In England, the Anglo-Norman system began when customary law throughout Europe was of far more importance than other sources. Even as late as the end of the 1700s, Blackstone in enumerating the sources of English law, states that they consist of *lex scripta* (statute law) and *lex non scripta*. Under *lex non scripta* he enumerates: (i) general customs (e. g. the course of inheritance, manner and form of making conveyances of land, remedies for civil injuries); (2) particular customs (e. g. the custom of Gavelkind in Kent, the customs of manors, the custom of local jurisdictions, the custom of merchants); (3) the foreign law adopted by custom in certain courts (e. g. the courts Christian, military courts, admiralty). In enumerating the varieties of *lex non scripta*, Blackstone does not include *usus fori* (judicial practice, jurisprudence des arrêts). According to Blackstone, the courts are “the depositaries of the laws” and the decisions of the courts “are the evidence of what is common law.” Some of the early treatises on the common law, also, are cited as authority. Among them, Blackstone mentions Glanvil, Bracton, Britton, Fleta, Hengham, Littleton, Statham, Brooke, Fitzherbert, Staundforde, and Coke.

A German authority (Gareis) writing after the enactment of the German Civil Code (1896, effective Jan. 1, 1900) still mentions as legal sources only legislation and custom.

Custom. It is necessary to distinguish several varieties of custom as follows:

(1) *General immemorial custom.* The best illustration of this type of custom is the English common law. The common law for several centuries has been embodied in the decisions of the courts. What, in early times, was represented in the beliefs, traditions, and usages of the people, is now superseded by the customs of the courts. For this type of custom there probably never was any test of legal validity other than reasonableness and what was reasonable was determined by custom itself.

(2) *Adopted custom.* This type of custom (and the term seems in this application a strained one) is not phenomenal as is the case with other types. The most noteworthy illustration of adopted custom is the reception of Roman law in Germany in modified form as 'usus modernus.' The Roman law became the common law of Germany in those provinces which did not have an exclusive territorial law. Its authority was superseded by the adoption of the German Civil Code.

(3) *Mercantile custom.* Mercantile custom is best illustrated by the law merchant. It no longer stands as usage, merely, and is now incorporated into the common law, and, to some extent, has been legislatively codified (e. g. Negotiable Instruments Act, Warehouse Receipts Act, Sales Act). Theoretically, mercantile custom still may continue to provide new rule materials. The creation of new economic practices might bring into being an entirely new field of mercantile custom. For the older fields, dealing with devices of credit, distribution, and transportation of money and goods, the field of mercantile custom has been so far narrowed by the common law and legislation that its creative force is rarely wit-

nessed, since new mercantile custom must be consistent with both.

(4) *Local immemorial custom.* This type has ceased to have any creative influence. The reason for this decline may quickly be understood by considering the requisites of legal validity of local immemorial usage, as follows: (i) it must be reasonable; (ii) it must not have begun later than the commencement of the reign of Richard I (the judicial interpretation of immemorial antiquity); (iii) it must have been continuous; (iv) it must have been peaceable; (v) it must be certain; (vi) it must be considered as compulsory (*opinio necessitatis*); (vii) it must be consistent with other local customs; (viii) it must be consistent with statute law. Local immemorial custom may be in conflict with the common law, but it will, in such case, have a strict construction.

(5) *Local mercantile custom.* This type is illustrated by the customs in mining districts. It also has an operation in the law of landlord and tenant (e. g. to determine who is entitled to the way-going crop). Furthermore, it also has an operation in the interpretation of commercial contracts (e. g. the time and place of making an inspection of goods). The field of local mercantile custom is highly restricted. It has application only in certain favored types of case and it is limited in creative force by the common law and by statute. It must not be inconsistent in our law with either of them.

Custom as a source of law. In Roman law, custom had only a subsidiary place alongside the other sources. In contrast, the general immemorial custom of English law had primary importance and was embodied as a whole into the common law. Modern custom, however, in our law has an inferior position

in comparison with custom in modern Roman law as employed in European countries. In Europe, if custom meets the tests of continuity, necessity, and reasonableness, it is on the same plane as legislation. It may derogate from statute law. In our law, all types of custom submit to statute law.

The difference in treatment of custom, in connection with other sources, develops also a difference in juristic opinion as to the legal nature of custom. In those countries where custom is regarded as determining its own validity, custom is regarded as a legal (authoritarian) source. In our law, custom is not a legal source but only a causal source. A usage, in our law, does not of itself generate legal rules any more than the making of contract of a new kind generates a new rule of contract law. It is simply the material upon which the rule is based. There are already in existence various rules upon which we may predict with reasonable assurance that a given custom or a given contract will be recognized as valid. This recognition, it may be supposed, will also have a retrospective operation to embrace other cases falling within the usage or the form of the contract, yet the rule in both cases comes from an organ of the State and not from the non-official conduct of those who create the causes which evoke the expression of the rule.

Legislation. Legislation in the widest sense is the creation, alteration, or abrogation of legal rules by the government. That wide meaning is useful only for a consideration of the problem of the separation of powers. In the prevailing legal sense, legislation is an abstract declaration of legal rules antecedent to, and unconnected with, their concrete application. In all modern systems of law, legislation is an official source of law. In America, all legisla-

tion is under control of the courts from the standpoint of constitutional validity. In England, and in other countries, with rare exceptions, there is no constitutional control over legislation, and the legislature itself is the ultimate authority on the question of validity. In our law, subordinate legislation (e. g. of a city council) is subject not only to tests of constitutionality and power to act under authority delegated, but also is subject to the test of reasonableness. Legislation normally acts prospectively, but, except as limited by a constitution, it may operate also retrospectively and create duties and liabilities based on past conduct or other past situations of fact. All legislation, in all countries, is subject to control by the courts by means of construction.

Legislation differs widely in scope (i. e. the incidence of duties created by legal rules) and in the methods of creation. The one often has a direct connection with the other. The various kinds of legislation are the following:

(1) *Supreme*. Such is the legislation of Parliament, Congress, and State legislatures. There is no higher legislative organ to supervise their enactments.

(2) *Colonial and territorial*. The authority of a colony or territory to legislate must be derived from a higher legislative organ, and, usually, such legislation is subject to control by the higher organ of legislation.

(3) *Executive*. The extent of executive power in the political head of the State has varied widely in the historical period. After the death of Alexander Severus, the only new legislation was by way of executive declaration (*constitutiones*) of the Roman emperor. From the beginning of the fifth century,

only the writings of the classical jurists and imperial constitutions were used in practice as sources of law. In modern times, the legislative power of the executive has been reduced almost, if not entirely, to the vanishing point. In the American State, the chief executive is the chief legislative officer but he has no independent power of creating legislation. Executive legislation is called 'orders' or 'decrees' and not 'law.'

(4) *Administrative*. Administrative legislation of boards, commissions, and sometimes individual persons, has developed on a large scale within the last generation. Such legislation is always subject to the supervision of the supreme legislative organ and it is also subject to control by the courts as to its reasonableness. Sometimes, the chief executive is authorized to carry out a legislative purpose (e. g. the power of the president under a flexible tariff act). The fact that the chief executive is the officer authorized to give concrete form to the legislative purpose, does not alter the fact that the power is administrative. The power is derived and does not exist independently. Administrative rules of law are not known as 'laws' but as 'regulations.'

(5) *Judicial*. The courts have certain powers over procedure. How far this power is independent of legislative control of the supreme legislative organ is still a matter of doubt in American constitutional theory, but to the extent that this power is independent, it is a different type of legislative power (e. g. to make rules of court). Such judicial legislation is known as 'rules.'

(6) *Local*. Local legislation is illustrated by the legislative declarations of town, village, and city boards and councils, park boards, drainage district boards, etc. They are subject to legislative control

by the supreme legislative organ in content and by the courts as to reasonableness. This kind of legislation is called 'ordinance.'

Summary of legislative sources. In the American plan of government supreme, executive (so far as it exists), and judicial (within limits) legislative power are constitutionally independent. Colonial and territorial, administrative, and local legislation are constitutionally dependent on the supreme legislative organ.

Legislation is limited to abstract declarations of legal rules by agencies of the State; that is to say, legislation is the creation by the government of a conceptual formula of future conduct. Legislation, therefore, in the technical sense is distinguishable from rule making by agencies outside the government. Corporate and other forms of association are organized under charter provisions and by-laws. Certain forms of corporations (e. g. universities) sometimes also have regulations called 'statutes.' These rules, of course, are binding on all those persons who lawfully consent to them, but as to existing members they are also binding contrary to consent, since the rules may be changed by virtue of other rules, over the protest of dissentient members. Where the by-laws or 'statutes' of an association operate in invitos, they have a quality that attaches to jural legislation. Such rules are not, however, legal rules; they are authorized by legal rules, but, in themselves, they have no official character.

So-called 'special' legislation also falls outside the sphere of technical legislation but for a different reason. The commands involved in special legislation (e. g. a pension act) is official and the command proceeds from an organ of government (e. g. Congress) but such special legislation does not create a

general conceptual formula of future conduct. Commands of this type may be distinguished from 'laws' by the term legislative orders. They are no more entitled to be regarded as laws, in a technical sense, than the command of a military superior to an inferior or of an administrative officer to a clerk or stenographer.

Judicial precedent. Judicial decisions as a source of law present a very curious legal situation. Apparently, nowhere, since the beginning of the Roman era, have they been recognized in strict legal theory as genuine legal (authoritarian) sources and yet, everywhere, they are the predominant and ultimate concrete and practical manifestations of what the law is. So important is the practical position of precedent that writers on legal theory of this generation have generally defined law as the body of rules recognized and applied by the courts.

Justinian in his 'constitutio tanta' expressly provided "let no one seek to quote or maintain any rule of law" other than those contained in the *corpus juris* "on penalty of forgery." This legislation of Justinian then became the exclusive legal source of law for the Roman State, and, in later centuries, the Roman law became the adopted customary law for the greater part of Europe. In continental Europe, even today, in general, judicial decisions, as a source of law, do not have a persuasiveness equal to the best commentaries, and the rule of *stare decisis* is unknown. In Latin America a practice has appeared which is a mean between the Anglo-American rule of *stare decisis* and the Romanic practice. If a rule has been applied several times by the highest court in different cases, it is thereafter regarded as binding.

Precedent has an anomalous legal position even in our own law. There is the judicial custom of *stare decisis* and also the declaratory theory of precedent (except in equity cases). Whatever the dominant legal theory, it can hardly be doubted that for any country with a well organized and professionally trained bench, '*usus fori*' must become, in greater or less degree, a true legal (authoritarian) source. The rule of *stare decisis* is not a necessary part of a *usus fori*, and it must also be recalled that the rule of *stare decisis* was created by the courts. The same organ that created the rule has power to abrogate it. The binding force of judicial decisions is more recognized in England than in America. This is due chiefly to the fact that in England there is a hierarchically organized system of courts, while, in America, the State court system is an organization of independent units with little or no interaction, except in the appellate process. Another influential fact is that of the multiplicity of States each of which has an influence on the others in the application of law.

✓ In England, due to the unified character of the judicial establishment, there has grown up a somewhat elaborate judicial etiquette touching the controlling force of precedent. The House of Lords and the Court of Appeal consider themselves absolutely bound by their previous decisions. The decisions of superior courts are binding on inferior courts. The decisions of inferior courts, if long established, in general, are binding on superior courts. The decisions of coördinate courts also are accepted as conditionally binding. In America, there is only one rule that is generally observed—the decisions of the highest court are regarded as binding on all lower courts. The maxim '*communis error*

facit ius' no doubt is in the background of judicial policy because it has the persuasion of good sense for its support, but all American courts of last resort feel free to depart from previous decisions when the need is strongly felt. So far as any present appraisal may be made of so vast an institution as that of precedent, mounting now into hundreds of thousands of reported decisions, it would seem that stare decisis is tending to become less a compelling rule and rather more a counsel of policy. That the rule often has been put into application oppressively is abundantly verified; that there are fields of law where it has no place is clear; and that the judicial establishment can exist without such a rule and without working a catastrophe to human society is free from doubt.

American courts have sometimes invoked the rule in cases where it would work injustice in the case at bar by stating that a change of the rule, lay in the competence of the legislature. How little reliance can be placed on this solace to the unjustly defeated litigant may be illustrated by an Illinois case decided fifty years ago. It involved the formality of a seal. The court divided sharply and the majority felt constrained to follow the ancient common law rule, saying that the legislature had power to alter it. The Illinois legislature has not even yet altered the rule, and there is no practically effective way in use by which changes in rules can be accomplished when they are needed.

Legal rules, when they are free from the influence of class interest, express the State's policy as to what is desirable. The purpose back of legal rules can not ever be entirely ignored in the application of them. But the purpose of a given rule, at a given time, may give way under changed economic condi-

tions. The maxim '*cessante ratione legis cessat lex ipsa*' has never proven efficient to avoid the decrepitude of purpose in legal rules. The reason for this goes quite beyond any formal power of the rule of *stare decisis*. The courts in applying law have not the time to undertake sociological inquiries, even if the judges might be assumed to have the training necessary to make them. There is already difficulty enough in ascertaining what existing rules may be applied, without undertaking the further labor of minutely examining the historical and economic situation which brought the rule into being and then of pursuing a similar inquiry into the conditions of the time when the rule is to be applied, to ascertain if the purpose has been overcome or modified. For example, the rule concerning arrest without warrant was created in an entirely different society and economic background than now obtains. It is clear that the old common rules will favor the escape of criminals under modern conditions with its industrial era and large cities. The judges of courts may be expected to understand in outline at least the basis of the common law policy underlying arrests and to be familiar enough with modern conditions to perceive the normal effects of application of the rule. But the rule of '*cessante ratione*' is not employed to extend the operation of the power of arrest; it never extends a power, and, especially, it does not extend a power operating against freedom of the subject. Likewise, the rule of '*cessante ratione*' has no effect on statute law where the meaning is clear.

The illustration put is one of the simplest and the solution for it is clear enough; but, for the bulk of our legal rules, the economic situation before and after is not clear. For many legal rules, the point of origin is lost or is imperfectly known, and if the

point of origin is obscure, then the surrounding social conditions which determine purpose can not reliably be ascertained. For the larger part, in the application of law, inquiry into purpose is foreign to the judicial process. There was however an era not yet entirely passed when inquiries of this kind were carried out on a somewhat extensive scale. The English common law was received into American States by statutory adoption usually as of a given time. As so adopted the English common law together with statutes is a part of our own law, with the limitation "so far as . . . applicable and of a general nature" (e. g. in Illinois prior to the fourth year of James I—March 24, 1606). As a result of this wholesale adoption of a foreign body of law, some rules of English common law were extended and many others limited. These extensions and limitations were based on an inquiry, often very superficial, of the differing economic conditions in the two countries.

The problem involved here may be explained by a homely example. An architect's plan is prepared, to erect a building. The work of construction is now in process at different points. Bricklayers are putting up a side wall; other workmen are carving stone; others are preparing materials for the interior of the building. Clearly, no considerable discretion can be reposed in individual workmen which might affect the plan of the building. An individual bricklayer may think that the wall would be stronger or would have a better appearance if the plan were changed. It is evident that the question of policy must be put into the hands not of the many individuals who apply it in detail but of the few who can undertake responsibility for the whole result of the policy. But the problem is one of more and less. If

a defective piece of material reaches the hands of the workman he may reject it as unfit without the slightest knowledge of the general plan. The illustration, of course, fails for the law in that, the creation of it is not the work of the few but of the many, and, for our common law, the work of creation was that of application. The time, however, has now passed when, for the development of our law, we can expect efficient results to be attained by this piecemeal democratic process. The age is one of specialization, and the law is very nearly the only important institution which fails to recognize it. The tradition still prevails that the law must develop exclusively on the basis of trial and error; that we must put up legal structures based on a priori generalizations worked out in the chambers of the lawyer or the closet of the judge; and then if the building does not soon fall down into a ruin, we may be sure that the generalization is sound. As an integral part of this professional tradition, it is regarded as a virtue when legislation, and especially economic legislation, is so drafted as to leave the widest scope of application to the courts. The law of the Sherman Act to combat trade restraints is a classical example of legislative indeterminism and judicial obscurity. The Due process clause is a classical constitutional example.

It may be admitted, readily enough, that this process of creating legal rules by development from case to case was a necessary one, but it is a necessity itself connected with an historical law that is valid only in the first stages of the growth of law. Early law everywhere was a secret law. At Rome, it was the secret of the pontifices. In Japan, a generation ago, even the criminal law was not known to the people. In our time, our common law remains, for the

bulk of it, the secret of a professional class and the ultimate pronouncement of it lies with a smaller judicial class. In form, our law is open to every subject; in substance, it has become to a large degree so esoteric as to give difficulty even to those initiated into its mysteries. Another outstanding explanation of our legal situation is the unsatisfactory character of legislation both in form and in substance. These defects, no doubt, are directly traceable to our political system, and until that system is improved, the known evils of the form of our law must be regarded as a safeguard against tyranny and incompetence of legislatures and as the only means possible, under existing conditions, for bringing about changes in the law.

Scientific development of law. Under ideal conditions changes in given legal rules should be the care of specialized organs of the State. The tendency manifested by European experience is to divide the organs of law creation and change of law into two parts: (a) an organ of investigation and initiation; (b) an organ for consideration of measures initiated and for approval. The first organ must be, at any rate should be, constituted of a small body of experts, competent to direct investigations of an historical, economic, and technical nature, into the workability of proposed legal rules, the historical background of rules to be altered, and the social and other considerations which affect what is proposed. To a certain extent, in several American states the investigative function is employed by legislatures and expert assistance is also employed in drafting of bills. This method, no doubt, is helpful but our legislatures are too large to make this method one which can regularly be employed. Science can not be either used or directed by the multi-

tude. Legislative reference bureaus, therefore, can have little effect on the substance of legislation, although they may, and do, affect the matter of its form.

The organ of consideration and approval should be the representatives of the people. Our legislatures as now constituted are largely recruited from the lawyer class. Under existing conditions, the predominance of lawyers in the legislature has not been a misfortune, but, under ideal conditions, it might be desirable if the representatives of the people were predominantly representatives of its economic life in trade, commerce, and industry, rather than lawyers who, in general, can have but superficial knowledge of the actual currents of economic life. This organ also would improve in efficiency and responsibility, if its numbers were much smaller than the numbers now elected as representatives. Whatever may be the need of a bicameral legislature for the federal State, there is probably no sufficient reason for a bicameral State legislature. The bicameral legislature, so far as concerns our law, is simply a parcel of the general tradition that law making of any kind, by legislatures is disfavored and that changes of law should come from the courts. Therefore, the legislative power is divided so that the activity of one house is neutralized by the inertia of the other.

Development of law by means of new rules or changes in old rules through the agency of the courts, has already become an anachronism. In sum, the objections to this method of effecting changes in law are:

(1) It delays the course of litigation if the courts must not only seek to discover the applicable rules but must also investigate external social conditions

to determine the range of just and reasonable application of legal rules.

(2) It puts a burden on the courts to carry on investigation of a kind for which they are not generally fitted, especially on questions dealing with economics and the sciences. Even as to questions of legal history, the courts are not equipped or trained to make specialist researches.

(3) Since the function of law creation is confused with the function of law application, the need of specialism as to each, suffers. The creative function is often confused with the technical function of application, i. e. the problem of policy is confused with the problem of logic. The uncertainty of the law is thereby increased, since the relative weights of policy and logic can not be isolated when a concrete decision is considered as a source of law.

Certainty of legal rules. The law may be uncertain for various reasons as follows:

(1) There may be a lack of definite legal rules to govern conduct, or there may be an entire absence of legal rules. This feature may be illustrated by the problem concerning the use of air spaces by aircraft and the questions concerning property rights in transmitting radio messages on wave lengths appropriated by prior users. A few years ago, there were no definite legal rules for the problems which could be applied mechanically. The development of legal rules, however, generates a series of underlying postulates, usually indefinite in proportion to their generality; that is to say, as the class of ideas involved in a legal rule is enlarged (i. e. decrease of logical intension) the range of possible application also is increased (i. e. increase of extension); or, in other words, the increase of the range of the class of ideas, decreases the connotation of the rule. Where

there is no specific legal rule, theoretically the needed application may be derived by a logical process (a) of deduction from the postulates of law or (b) by analogical extension from other legal rules. In practice, however, these logical processes are not controlling, and perhaps not even important. The rule actually applied in such a case probably will be to a large extent an independent creation.

Only a painstaking examination of a considerable body of case material will disclose the methods actually used by the courts. No exhaustive study of this logical problem seems to be available for our law. There are however various treatments of the question by judges and jurists explaining, in general terms, the elements of the judicial process, but discussions of this kind can not take the place of the precise information to be derived from a detailed examination of case materials.

(2) The law may be uncertain because of its unorganized bulk. Such was the condition of Roman law prior to the *corpus juris* of Justinian who frequently mentions the "*immensa veteris prudentiae volumina*" out of which his compilation was to be constructed. Our own law, also, has become uncertain because of its bulk, notwithstanding the development of very efficient finding tools in the form of digests and encyclopedias. Even the digests of our law have become so formidable as to make very laborious the task of ascertaining rules of law. Without these finding tools, our law would be literally chaos.

(3) As the bulk of the sources increases, contradictions increase. These contradictions often are reconciled, but only by increasing the bulk and complexity of the law. In the case of contradictory statutes, the technical problem is simpler, since the

legislative declaration later in point of time, will prevail. Contradictory judicial decisions will by a general professional tradition be reconciled if possible; or, if not possible, ignored, or less commonly, overruled.

(4) Uncertainty also is increased by defective or inartificial declaration or statement of legal rules. The difficulty at this point, so far as concerns judicial decisions, has already been noticed—the difficulty of ascertaining the conceptual limits of the rule as measured by the actual application of it. This form of uncertainty appears with great frequency in legislative declarations. That legislation will be defectively declared is accepted as a natural and almost necessary fact. Only the presence in legislatures of lawyers and private unofficial professional assistance in the drafting of bills, have prevented this function from falling into complete disrepute. Lack of development of a science of legislation in its two aspects of form (terminology, style, logical treatment, etc.) and of substance (historical research, technical knowledge, policy, etc.) will forever prevent this function of law-making from attaining its proper level. With all of its avoidable and unavoidable deficiencies, as a method of developing law, precedent is far superior to existing legislation at all points of comparison that touch the human factor.

Effect of the declaratory theory of law on certainty. Where the custom of stare decisis breaks, as it often does, in favor of a new rule, the declaratory theory may bring about an unfortunate result. It will be recalled that the declaratory theory of law is that the courts do not make law but only apply it, or more accurately, attempt to apply it. What the court does is not in itself law, but only evidence

of what the law is. This theory makes of law a perpetually insoluble and unapproachable mystery. When, however, a court breaks through the rule of stare decisis and makes an application of law which is the induction of a new rule, while, theoretically, the law (rule) has not changed, the practical effect is precisely the same as if a new rule had been made and that is the actual professional view of the matter.

All this would be highly inconsequential if the declaratory theory did not carry with it the very important consequence that all legal relations created by contract, grant, or in whatever way, whether now in litigation or not, based on the credit of the old rule would be affected by the new rule. A rule of law made by a legislature ordinarily has only a prospective operation, and, in some cases (provided by constitutions) it can have only a prospective operation. Where a new rule of law is established by the courts, this new rule has not only a prospective operation but also a retrospective operation on all executory legal relations whether then in litigation or not. Unfortunately the maxim of '*communis error*' does not reach these situations. If there were frank recognition of legislative power in the courts, new rules of law would have, in general, only prospective operations, leaving the old rule to operate on all past situations whether in litigation or not. There is already some tendency to give such an operation to precedent. There would seem to be no governmental obstacle to the putting into effect of such a rule when it is recalled that the declaratory theory and the rule of stare decisis are customs created by the courts themselves. There might, however, be some considerable practical difficulty in the operation of such a new custom in that

it would often be difficult to determine what the old rule was or even what the new rule is, for the reason that changes in the law made by court applications are made as Holmes has expressed it "interstitially."

All these difficulties simply reinforce the view that for attaining and preserving certainty in the law, so far as it is desirable, the method of changing law by application without anything more, is highly wasteful of time and effort, is inimical to certainty and security of legal transactions, and is out of alignment with the scientific spirit of the time.

Evils of the uncertainty of legal rules. That a legal system can exist where highly important rules of law are wholly unknown to the subjects of the State and even practically unknowable, is thinkable and historically verified. As already pointed out, the nature of our legal sources has become such that the average man lives a life of Natural law. He avoids all acts which bring, as a direct effect, harm to others. For the rest, he is helpless without professional counsel. Even large affairs and small of commerce and industry are administered according to certain patterns of business usage without the slightest knowledge of what are the governing legal rules, and, certainly, with no knowledge of where these legal rules can be found in official form. Where the layman, acting on traditional habits and according to his own sense of prudence and right, is excluded from practical access to the sources of law, the trained professional lawyer is at least partially excluded from certain knowledge in detail of the law for the same reason. That reason explicitly stated is that there is no single literary monument in our law which is a final and irreducible literary source of any legal rule whatsoever. There are

various approximations to this finality and ultimateness (e. g. clearly expressed and logically complete constitutional and legislative declarations) but for our law, considered as a whole, legal rules in definite official literary form either do not exist, or else, where there is such an official literary form, the whole range of the rule must be gathered from an indefinite variety of literary monuments, where the form of statement is less important than the undefined connotations. This may well be illustrated by legislative declarations, in general, or by such constitutional provisions as the Due process clause. In strictness, what is said of the absence in our law of definite literary monuments of legal rules, applies also to code countries, but in code countries with modern codes (e. g. Germany) the uncertainty of law, is not striking, since the code, at least, is accessible to all persons with no inconvenience. What the code provisions mean is another matter, but, here, again, there is less practical difficulty than in our law, since the search material is more compact and less voluminous.

The evils of uncertainty of legal rules are many, and, for the most part, fairly obvious. They may be enumerated as follows:

(1) Business transactions often are hindered until the parties can ascertain what risks of law are involved, and in what way they may be avoided. This disadvantage manifests itself chiefly as an economic loss in the form of legal expense.

(2) Litigation is encouraged in doubtful cases.

(3) Transactions may be entirely impeded because of legal uncertainty.

(4) Where the law is unascertainable or uncertain, its moral force is weakened.

(5) Uncertainty bears most heavily on those unable to bear the expense of litigation. They must give way in matters of dispute because of the risk of litigation.

(6) The administration of justice will lack much in uniformity where the law is uncertain.

(7) The appliers of law will be subjected more often to extra-legal influences where uncertainty exists.

(8) The appliers of law will more commonly be charged with favoritism where uncertainty exists.

(9) The government, in a condition of uncertainty of law becomes one of men instead of a government of law.

Prevention of uncertainty in legal rules. Uncertainty of legal rules is justified by the statement that the permutations of human conduct are infinite in variety, and that it exceeds the limits of human intelligence to provide definite legal rules for all of these manifestations of human conduct. The statement goes too far. The varieties of human conduct having legal consequences are not infinite. Our law has had a documented history of seven centuries, if we begin with the Year Books. In these seven centuries, it is not too much to assert, that the principal varieties of human conduct have been manifested. The source material, of course, is prodigious. To organize this great mass of legal experience into a logical whole, where nothing is omitted, would be a stupendous labor, but the difficulty of it lies not in the concrete mass of material accumulated in the course of our legal history but in the lack of conceptual tools necessary to coördinate the historical material into legal categories. There are already various kinds of attempts to deal with this material in systematic form, but none of these ef-

forts has been able yet to achieve complete logical unification of the historical material. Lack of complete logical unity has not been attainable in encyclopedic statements, however extensive, of all the law, or in digests, however complete, or in institutional treatises, nor has such unity been achieved in treatises of special topics of law. One of the reasons for this shortcoming is that the point of departure for these efforts has been the historical material itself which has been allowed to fashion the matter of classification. Another reason is the inherent difficulty of separating legal materials which normally have more than one aspect. Another difficulty that enters into the problem of stating the law is that it is constantly in motion.

Uncertainty of legal rules is not logically a necessity and it is a confession of scientific incompetence to assert that it is practically a necessity. That there is uncertainty on a very large scale, is plain enough. What the reasons are for this condition also is reasonably clear. That a complete statement logically organized of all legal rules in such form that a legal consequence may be drawn from the law, if not mechanically, at least with the reasonable appearance of logical certainty, is at this moment not realized in any system of law; that it expresses an ideal, and that the juristic skill to attain this ideal is wanting—all this may freely be admitted, but it by no means follows that the ideal situation may not be measurably approached, or that the effort is beyond human power.

The practical and other steps in a direction leading to the ideal of a certain body of law are as follows:

- (1) Development of a scientific terminology of law terms and a plan of classification that will pro-

duce logical distribution and unity of all legal ideas without gaps and preferably without overlapping. It would not, necessarily, be accounted a defect if gaps were found if they were recognized as such. The problem of overlapping usually is regarded as insurmountable in logic classification but there is no reliable proof of its necessity. To what extent legal rules of the type known as 'infama species,' can be generalized into higher and ultimate forms is a problem that has had little consideration. In this respect, our own sources may be contrasted with a modern instance such as the German Civil Code which is constructed on a basis of generic rules. Our case materials, in essence, are applications only, and not rules, even of a primary order. An American code which should attempt to reproduce in organized logical form the body of the law would not be a body of legal rules at all but only a classified catalogue of instances.

The labor of constructing a scientific terminology and a workable classification is one still of the future. European codes have been possible with a minimum of difficulty because they have had a long historical background of terminology and arrangement conceived in terms of logic and not based as are our terms and classifications on historical accident. Yet, it must not be supposed that European codes have achieved the ideal in certainty of law. They have somewhat more closely approached it, but they still fall short of what is necessary to realize it. The chief reason is that these codes, especially the recent ones (e. g. Germany, Switzerland) still leave much to be desired on the logical side both as to terminology and classification.

(2) The next practical step is that of the factual statement, distribution, and arrangement of legal

rules into a system. The fact that the law is in motion is one which has been advanced as a reason for refusing to fix it at any point. This recalls the now long forgotten debate between Savigny who opposed codification and Thibaut who favored codification. In the country where this controversy was carried on, the issue was resolved in favor of codification. That the law normally is in a state of flux, presents no reason for not attaining such certainty of it as may be possible. Statutory law also is constantly changing either in the form of legislative corrections, or, less openly, in the process of application. That such formal declarations of legal rules are useful if not definitive, is quite apparent. No doubt then can be entertained that it would be highly desirable if the body of legal rules actually or potentially bearing on human conduct were available in logical, literary form, even though in gross and in detail, these same rules were being subjected to a corrosive process which in the course of time would substantially modify the whole structure of the law.

The desirability of attaining a relative fixity of legal rules being admitted, the problem then presents itself of how modifications in the structure are to be effected. There are two possible views:

(a) That the whole structure be regarded as directory only as representing the best possible statement, on the experience available, of what is desirable, leaving to the appliers of the rules, discretion to modify them as the justice of the case may seem to require.

(b) That the structure of formulated legal rules be regarded as mandatory, leaving the matter of changes to be accomplished by direct legislation.

(3) The third necessary practical step to attain and preserve certainty of legal rules is the creation

of a commission of justice which would see to it that changes made or desirable would be incorporated into a revised statement and presented to the legislature. Such a liaison would be necessary under either of the above two views. Absence of such a connecting link, between the application of legal rules and direct legislation, is one of the principal causes of the unsatisfactory character of our legal establishment. This device would make possible the continued development of the legal system on an intelligible basis.

Lack of specialization as a cause of uncertainty of legal rules. The law has grown tridimensionally. In the first place, the range of legal ideas has expanded. For illustration, a law of value documents (e. g. bills, notes, warehouse receipts) is largely the product of a late period of legal development. This expansion is manifested by the many new fields of special law. In the second place, the older sphere of general law, also, has expanded under similar influences. The existing institution of contract law has grown to giant proportions in comparison with the body of contract law two or three centuries ago. Some legal institutions have disappeared or have atrophied, but, considering the law as a whole, it has expanded enormously within a range of a few centuries. In the third place, as the general and the special law have expanded, the underlying postulates and generic rules have deepened. This tridimensional growth of the legal structure is represented by its literary monuments which have become so extensive in bulk and items that no law library contains them all.

While the law itself has increased in bulk and detail, in all directions, the general scheme of court organization has not been adjusted to meet the in-

creased intellectual burden thrown on judges in mastering the material, largely the creation of judges themselves. The point is reinforced when it is recalled that the legal rules embodied in judicial opinions present far greater mechanical difficulty of approach than legal rules formulated in direct legislation. Each case represents a detailed application of a legal rule, and may, and often does, represent a more detailed form of a more general rule. The intellectual labor of gathering the applicable rule for a new situation (and the typical controversy will always be a new one in one or more features) involves a large expenditure of time and effort. In the general scheme of court organization, putting aside special administrative tribunals (e. g. workmen's compensation boards) and certain few specialized courts (e. g. probate courts, juvenile courts, small claims courts) any legal controversy touching any part of the entire enormous bulk of the legal system, may be presented to a court for adjudication and an appeal will go to another court having a similarly extensive jurisdiction, and may also go on ultimate appeal to a supreme court with jurisdiction of all legal questions that can arise. The point need not here be overstated, and it is enough to say that where the intellectual work of applying legal rules is not specialized, the risk of error is increased and the uncertainty of law is favored. A companion result has been that the courts, in all the principal centers of litigation, have become submerged by an undigested and indigestible mass of litigation. The idea of specializing the courts is not a new one, but for reasons not easy to understand, it does not meet professional approval. This situation along with many others, and not least of all, an intolerable sys-

tem of procedure, contributes to make the law one of the most dismal of the professional arts.

Other official sources of law. We have considered at some length, the claims of custom, legislation, and precedent as legal (authoritarian) sources. Custom has been excluded as not either a legal or an official source but as only a causal source. Our system of law recognizes no official or legal sources other than legislation (direct law making) and precedent (indirect law making). We have seen that at Rome the legislative sources were various; they might consist of laws enacted by the proletarian assembly (plebescita), the laws enacted in the patrician assembly (senatus-consulta), executive laws (constitutiones principum), and laws declared by judicial magistrates (edicta prætorum). Case law at Rome was of little importance, due perhaps to the orality of judicial procedure. Customary law ceased to be of importance before the time of Cicero, except in certain special tribunals which retained an ancient jurisdiction. But, at Rome, there was recognized one source of law peculiar to that system—the legal opinions of lawyers (responsa prudentum). From the earliest times these opinions were an unofficial source of law used by the magistrates, and, especially, when the magistrate himself was not a lawyer (jurisconsult). Before the time of Augustus, these opinions were of equal rank *prima facie*. Augustus authorized several distinguished lawyers to give opinions in his own name. From that moment, the opinions (responsa) of patented jurisconsults became an official source of law. Later, Hadrian gave additional legal force to the opinions of authorized jurisconsults by expressly ordering that those opinions should have the force of law and the magistrates were required to observe them in the decision

of cases. Still later, (in the 400s) under the so-called Valentinian law of citations, it was provided that all of the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus should have legal authority. Where there was disagreement, a majority of opinion controlled; where there was equal division of opinion, that of Papinian controlled.

As has already been noted, some of the older books on the common law are rated as authority, but, in modern times, in our law, no opinion of any jurist or any commentary, however notable, has any legal authority. In European countries, judicial opinions are not recognized as legal sources, and in the courts, the works of distinguished jurists are often rated higher by the courts and the bar than the decisions of judges. This undervaluation of precedent, and, on the other hand, exaltation of commentary, seems always highly unnatural to those trained in the English common law, but the contrast is a sound one. A judge can not be a specialist in the whole wide domain of law. His principal task is to make applications of law; research into the state of the law and inquiry into policy are subsidiary to the main task of decision. Following the long tradition which goes back to the earliest period of Roman law, the judges of the Roman systems have always given due weight to the opinions of learned specialists who have the time and ability to pursue detailed researches into questions of legal history and legal policy. The practice is one that accords with the need of division of labor and the reasonable expectation of efficient results of specialized work.

In both systems, there is, at present, a tendency to approach middle ground. In America, juristic opinion is now received with higher esteem than in any previous time. Commentary, even of the anony-

mous kind that is found in encyclopedias, is relied upon very extensively, comments published in law reviews even by students of law, are occasionally employed, and the opinions of recognized experts are more often than heretofore, decisive. This tendency to rely on specialized labors is perhaps still more attributable to the mechanical convenience of resorting to summations of legal doctrine, wherever found, than to any conscious deference to expert opinion, but the movement already begun may be expected to continue in favor of expert opinion in the proportion that this source of law attains a better position among experts themselves. Out of the great bulk of treatises on specialized subjects in our law, only a few have attained first rank.

In European countries, the tendency to elevate the practical position of precedent, is probably due to, at least it is coincident with, the revolt against jural conceptualism begun by von Jhering and continued by the movement for Judicial Freedom (*libre recherche, freie Rechtsfindung*). It was felt that the courts were confined too much by abstract ideas and categories, and, looking across the channel, it was seen that the English courts were in no way fettered by mere conceptions and could be free to develop the law as need and justice required. It was not clearly understood in the beginning of the European movement for judicial freedom, that the English courts also are fettered, if not, by given conceptions and categories, at least by their prior decisions, and that judicial emancipation might be a greater evil than judicial constraint, especially in a code country. The conditions surrounding the courts in the two countries are not comparable, and the European tendency must justify itself on the situation of its own law and the question of the desirability of having a

body of law that is certain. If relative uncertainty is desirable then it may be attained by the method of judicial freedom. Such a solution will reduce the code to a manual of directions binding only so far as the courts see fit to be bound. Without the balance wheel of *stare decisis*, which is only a flexible substitute for certainty of law, judicial emancipation may easily degenerate in a law of sentimentalism. The real question, it may be emphasized, is that of the desirability of certainty in the law, where, also, there is need of development of the law. The desirability of certainty, if attainable, hardly will be denied, so that the problem, in the end, reduces to a question of method of controlling development.

Unofficial sources of law. The official sources of our law are legislation and precedent. The unofficial sources are numerous. The unofficial sources operate through the two stated official sources. Legislation on a large scale is copied with occasional modification in America from the legislation of other states. The courts also adopt rules and policies from the judicial decisions of the courts of other States. The principal unofficial sources are the same kind of sources as the official sources—legislation and precedent. If professional opinion in our law were an official or legal source, no doubt professional opinion would often be based on other unofficial professional opinion. An official agency of law declaration will, by preference, look to the work of a similar agency. Thus, a legislature, when considering the desirability of new legislation, will not look to the decisions of another state as a basis of new legislation but rather to a concrete instance of legislation, and, secondarily, to the decisions interpreting the legislation. Likewise, a court when considering the need of a new rule or the modification of an old one

looks to the judicial opinions of the courts of other states and not to its direct legislation.

The unofficial sources of law may conveniently be grouped into two classes:

(1) Legal sources, i. e. sources which are authoritarian in the state or country where they are used. Thus, judicial decisions in Indiana would be official in Indiana and unofficial in Illinois. If an Indiana judicial doctrine were adopted by the Illinois courts, the primary source of the doctrine would be an unofficial, legal source. After adoption, the doctrine would have become an official, legal source of the law in Illinois. In a word, the unofficial, legal source of the doctrine, adopted in Illinois, would be the judiciary law of Indiana, while the official, legal source would be the law of Illinois. The ultimate source of legal rules adopted into a given system of law might, and often can, be traced back for many centuries. Some of the rules of our law are traceable to the medieval Canon law and others are traceable to the jurists whose opinions enter into the Digest of Justinian. Many rules are difficult to trace historically and the origin of many others is obscure or unknown.

(2) Non-legal sources, i. e. those which in their original formulation of rules are neither official nor legal sources. The principal type of non-legal sources is found in the writings of commentators and specialists. The value of these sources varies, and obviously depends on the reputation and ability of the writer. Blackstone's and Kent's commentaries are examples of that type, and Dean Wigmore's treatise on Evidence is an outstanding example of the other. The present tendency, in our law, is to give more credit to distinguished specialists in the application of law than to legal sources

which are unofficial. In time, perhaps, such writings will have even more persuasion than the official sources themselves. This has long been the situation in the Civil law so far as concerns precedent.

Summary of the sources of law. The principal distinction in the sources of law is that of the official and unofficial sources. The official sources are the constitutional or legislatively created agencies of law making such as the legislature and the courts. The term also is applicable to the law making itself, i. e. the concrete product of these agencies.

The unofficial sources of law are all other agencies which formulate rules, doctrines, postulates, and policies, including also those formulations, which are later received by an official agency of the State for the purpose of rule construction.

The unofficial sources of law are divided into two classes: (a) legal; (b) non-legal.

A legal source is one which has authority by virtue of law where the source is found. This authority may be (aa) within the State of discourse or (bb) beyond the State of discourse. Thus, customary law, in the Civil law, is regarded as a legal source in the State of discourse. A judicial decision of Massachusetts, later adopted in Illinois, is a legal source beyond the State of discourse (Illinois). After adoption, the rule is an official source in the State of discourse (Illinois).

A non-legal source is one which lacks authority where the source is found. Thus, a judicial decision in France would be a non-legal source in France, but the same decision might be adopted in England where, after adoption, it would become an official source. A magistral treatise in France would rank equally, if not even higher, with a decision of the Court of Cassation.

While these formal distinctions are made (often with a different terminology than here) and while they are convenient, yet it needs to be observed that they are in no way decisive in predicting legal phenomena either in our law or elsewhere. The basic element in the determination of future legal phenomena, especially in the courts, is persuasion. Persuasion is not wholly controlled by rule, nor can it be. The rule of *stare decisis* in our law is simply a *usus fori*. A court may disregard it; it may choose to be controlled by a non-legal source in preference to its own previous holdings. As a general principle, the courts will give weight to the sources in the following order: (i) official sources; (ii) legal non-official sources; (iii) non-legal sources.

§ 41. Interpretation. Interpretation is the meaning of a fact. As applied in the law, interpretation is ascertainment always of a complex fact such as the meaning of a custom, of a judicial decision, of a statute, of a regulation, of a contract, or of a will. The method by which an Interpretation is reached is Construction. Construction therefore is the means and Interpretation is the end. These definitions are not settled in usage. Thus it may be found that what here is called 'interpretation' is also called 'construction' and vice versa.

While all the sources of law and all jural acts require interpretation, the term has a stricter application to the literary sources and to jural acts which are evidenced by writings (e. g. contracts, wills). In the strictest and most usual meaning, interpretation is limited to legislative declarations. Since we are only concerned here with law and its sources, we shall confine our discussion to the construction and interpretation of legislative declarations.

Authentication. Before a legislative declaration can be interpreted, it is necessary first to find the authoritative literary text. The text must be established as a whole and in every detail including the words, the order of expression, and the punctuation. No rules can be laid down to govern these matters beyond those developed by the art of historical criticism. At the present day, the problem of authentication does not frequently arise because of better printing methods, and when it does arise, there is usually no great difficulty in the solution. But for the old legal texts written before the age of printed books, the problem of authentication is highly difficult and its solution calls for historical skill and learning of the first order. The nature of the problem may be better understood by inspecting, for example, Woodbine's researches in America on Bracton's "De Legibus," or the labors, still vigorously prosecuted, in Europe, dealing with interpolations of Justinian's Digest. In both these cases, the original texts are lost.

Sources of interpretation. The source of interpretation may be official or non-official. Official interpretation is of various kinds; it may be by the very agency which made the legislative declaration (i. e. the legislature) either in the same legislative text (e. g. by definitions, rules of construction) or in a later declaration (e. g. explanatory statute); or official interpretation may be by another agency of the State than the legislature (i. e. the courts). To lay persons, it might appear that the very agency which made a law needing interpretation would be the very one to be consulted as to the meaning. That, however, is not the practice in any country, and, for various reasons, it would not be either a workable or a desirable practice. In our government, there is

an additional reason for not asking the legislature to interpret its own legislation. That reason is based on the theory of the separation of powers.

Unofficial interpretation also is of various kinds but chiefly there are three varieties: (a) professional opinion; (b) administrative opinion; (c) administrative custom.

Lawyers, when preparing for clients the documentary evidence of jural acts such as contracts, grants, assignments, releases, wills, declarations of trust, often need to interpret legislation in advance of existing official interpretation. Where professional opinion differs, resort must be made to the courts for official interpretation, but the work of lawyers is the groundwork of the official interpretation which follows.

Officers of the government also must interpret legislation in the performance of their duties and in the exercise of their powers. This need is one which reaches all the officers of government—even the courts, the chief executive, and the legislature. Not everything acted upon by judges is adversarial; nor is everything done by the legislature rule making. Sometimes even a court may need professional opinion to guide it in a specific administrative task. Sometimes even a legislature may need professional opinion to guide it upon the validity of its acts. The need of professional opinion for the realization of government, is most clearly seen in the inferior departments of government. Thus, municipalities have official attorneys, counties have a county attorney, and even the State itself has an extensive law department for the higher executive departments of government. So great is the need of professional opinion in all the activities of the government, that inferior officers such as Sheriffs, and Treasurers

often employ private attorneys to advise them on their official duties and powers, and, not infrequently, even the higher officers of government rely on private professional opinion to guide them.

So far as such professional opinion is concerned with the interpretation of law it is of two kinds: (a) private, i. e. the professional opinion of private lawyers; and (b) public, i. e. the professional opinion of public lawyers, themselves law officers of the government. Private professional opinion is reflected in the conduct of the officers of government, but public professional opinion is also in itself a source (though an unofficial one) of law. The reason for this difference is that the opinions of public lawyers become a literary source of law, because, for the State government, they are commonly printed and are available to courts and lawyers.

Administrative custom which often has its background in professional opinion is an important source of legislative interpretation. A practice long followed by the government as a factual interpretation of statutes and even of constitutions, if reasonable, has all the practical force of official interpretation. The official recognition of such factual interpretation is based not primarily on any intrinsic deference to custom because it is custom, nor on any deference to coördinate departments of government, although these features may enter into the result, but rather on the need of certainty in the law. A factual interpretation long followed, even though technically contrary to the meaning of what is interpreted, furnishes a basis of certainty, and, as to past transactions, it would be more disturbing to legal security to establish the technically correct interpretation than to adhere to the one technically incorrect but accepted.

It will be seen that this situation presents the same problem as that which arises in the overruling of precedent. The evils of a new rule operating on past facts may outweigh the advantages of a change of rules.

Kinds of interpretation. Interpretation may be grammatical, logical, or historical. Grammatical interpretation is always necessary. Logical interpretation conceivably may be unnecessary. As greater skill and scientific knowledge are attained in the drafting of statutes, the need of logical interpretation will decline in direct proportion. Historical interpretation is the least necessary, in general, but sometimes it is of more importance than logical interpretation.

Grammatical interpretation. After the authentic text of a statute is determined, it is necessary to give meaning to each of the terms used in it in detail. In practice, grammatical interpretation is confused with logical interpretation. Where there is no need of logical interpretation, there is ordinarily no conscious need of grammatical interpretation, but yet the two things are distinct. Grammatical interpretation gives meaning to individual terms; logical interpretation gives meaning to terms in combination with other terms. Grammatical interpretation is based on the customary meaning of terms either in the language of the layman or of the lawyer. Usually, the terms themselves indicate whether they are lay or professional terms. If a statutory declaration is clear and complete in its verbal connotation, there is no occasion for logical interpretation. Apart from constitutional lack of power to legislate as the legislature has done (e. g. questions of Due process, Equal protection, Class legislation, etc.) the court

will carry out the meaning arrived at by grammatical construction. Whether the legislation is reasonable or not, whether it will be practically workable, whether it will attain the object sought, whether it should not have included other persons or other acts, whether it will work greater evil than good—all these are questions for the legislature itself, and the courts will not interfere. It must, however, be observed that the courts under the cloak of constitutional interference sometimes have interfered upon these questions and the line of separation between constitutional power of supervising legislation and legislative competence is often very obscure.

In the early decades of our American federal government, there were two views of how the federal Constitution should be interpreted. One view was that the federal government had only the powers expressly conferred and that such powers were to be strictly construed. The opposing view was that of implied powers and liberal construction. It may be noticed here that the Constitution itself did not provide a solution for this problem. The failure to do so was itself an illustration of defective legislation if the view of implied powers is the correct one. For example: the Constitution authorizes Congress to coin money; does this authorize the issue of paper money? The liberal constructionists prevailed, as a result of which, the powers of the federal government were enormously increased.

While the older problem has long since been settled, a new problem has taken its place. The new problem is that of the extent of legislative competence in working out new economic experiments. This problem, also, has developed two schools of constructionists—one liberal and the other conserv-

ative. The liberal camp favors the use of legislative powers except where there are clear constitutional obstacles; the conservative group favors keeping legislation within the old landmarks of legal tradition and economic policy. The problem is still an unsettled one and the situation as a whole presents all the advantages realizable from an experimental method of solving legal questions and all the counter-vailing disadvantages of uncertainty of law. It is a reflex of political conditions in the background of which may be seen a responsible agency of government (the courts) acting as a check on the anonymous and thoughtless force of legislation. Technically, the question involves another aspect of method in effecting changes in the law. So far as the Due process clause is employed to test the validity of legislation, its effect is to vest practically a power of veto in the courts.

Logical interpretation. Logical interpretation is necessary when a statutory declaration is imperfect in its sententia or meaning after the meaning of all its individual terms has been ascertained. There are two kinds of such imperfections: (a) patent imperfections and (b) latent imperfections.

A patent imperfection may arise from omission of a word or words, or from an incorrect insertion of a word or words. For example, the word 'not' may be improperly omitted or inserted, where the imperfection is entirely obvious, without going beyond the sentence where the imperfection appears, or, at the most, beyond the title of the act.

Latent imperfections are not obvious until the whole act is considered. Latent imperfections are of three kinds: (a) contradiction; (b) ambiguity; (e) incompleteness.

Where there are contradictory declarations, one declaration cancels the other. If the sententia can not be reliably ascertained from other non-contradictory declarations, a court will not choose the meaning which it prefers.

Ambiguity is another form of contradiction. A declaration may mean two things in the same reference, and, here, again, a court will not choose but will seek to ascertain which meaning harmonizes logically with the whole legislative declaration. Sometimes each choice may harmonize with the whole but in a differing degree. Both may harmonize perfectly with the general purpose but they may harmonize in detail in differing degree. In such case, the choice which will present the greater degree of logical unity with the act, as a whole, and in detail, will be preferred.

There are various kinds of contradiction and also of ambiguity. There are more species of ambiguity than of contradiction. So also there are more species of incompleteness than of ambiguity. If the incompleteness of a statute is absolute, a court has no room to act. If, for example, a statute defines a new crime and then fails to complete it by a power-disposition or penalty, it does not lie in the competence of a court to supply what is omitted. If, however, a statute is relatively incomplete, a court will seek to overcome it, if it can be done reliably after consideration of the logical meaning of the whole act. For example, if a statute deals with series *a, b, c, d, e, f*, and treats the first three in one way and the last three in another way, and if, in a later treatment of them, omits a detailed statement concerning one, the meaning may be supplied by the logical process of subsumption. But if each element of the series is treated independently, then a court

is not competent to supply the meaning to be applied if one or more of these elements is omitted from consideration.

In the contingency last supposed, the courts will act on a principle entirely foreign to the art of construction. That is to say, if it seems to the court that the legislature would not have acted for any of the items treated, if it had adverted to the lack of treatment of the other elements, then the whole legislative declaration will fall. This principle is frequently employed where a part of a statute is held unconstitutional. As to such legislation, legislatures frequently attempt to anticipate the result by express declarations (usually) that if a particular part or parts are found unconstitutional, that the remainder of the act shall stand unimpaired.

Spurious interpretation. Legitimate interpretation of statutes is confined to the curing of logical imperfections by the process of subsumption. Spurious interpretation is the result reached in the construction of a statute when what is clearly expressed is given either a more extensive or a more restrictive meaning. As Austin has shown, this is not really interpretation but legislative amendment by the courts. It also is a logical process. It proceeds from an assumed 'ratio legis' in contradiction of the 'lex ipsa.' It is, in a word, a reversal of the method of legitimate interpretation. Legitimate interpretation proceeds from the specific to the general for the purpose of discovering the solution of specific imperfections. Spurious interpretation proceeds from the general to the specific for the purpose of equalizing specific differences. Spurious interpretation may have the effect of incorporating new elements into a statute; of minimizing or even withdrawing

given elements; or of rearranging given elements in a new order and with new values.

The difference between legitimate and spurious interpretation is easily stated in abstract form, but, in application, the line often is very obscure. This is due to the fact that words rarely have a precise meaning. Giving words of indefinite meaning an extensive or restrictive application is hardly avoidable and this process alone may very essentially affect the operation of a statute in one direction or another. The natural difficulty of words is heightened by the inartificial manner in which statutes commonly are drafted. The difference, however, becomes unmistakable when under the guise of interpretation a clear meaning is extended or restricted, when new elements are added, or when given elements are withdrawn.

This question also again presents the problem of method in effecting changes in the law. The extensive powers of courts over legislation have the practical effect of reducing legislation to an inferior rank as a source of law. In many instances, legislation by the legislature is only a preliminary to legislation by the courts. The courts take the raw material produced by the legislature and fashion it into a finished product.

Historical interpretation. Sometimes historical interpretation is used as an aid of grammatical and of logical interpretation. Historical interpretation generally may serve to give a reliable picture of the causes and circumstances surrounding new legislation, but, standing alone, it can not control the literal legis. Legislation may arise from an existing need, but it may also attempt to anticipate a future need. Thus, the Interstate Commerce clause of the federal Constitution was adopted before the day of rail-

roads, telegraphs, air craft, or radio communication. These inventions could only have been contemplated imaginatively. They did not enter into the idea of commerce when the Constitution was adopted, but they have been so included not by historical construction, clearly, but by an extensive construction of the term 'commerce.' This extensive construction has reached even the degree of spurious interpretation in the range of what is now included as 'commerce.'

Intention of the legislature. It is very usual to speak of the intention of parties to a contract, of the intention of a testator, the intention of one who commits a tort or a crime, and also the intention of the legislature. The term 'intention' in its subjective meaning is irrelevant in each one of these instances. In each case, it stands as an awkward verbal symbol for what is done. The relevant question is not What did the legislature intend? but What did the legislature say (do)? Sometimes the debates in legislatures are referred to for the historical meaning of a statute but such material is not, and can not be, used to disclose what the legislature intended. Legislation is a group activity and it is impossible to conceive a group mind or group cerebration. It is impossible, also, to trace in the legislative result, in any reliable way, the individual state of mind of the various legislators at any given moment. Legislation is an objective phenomenon in which all subjective antecedents are irrevocably lost. Use of the expression 'intention of the legislature' is misleading and entirely unnecessary. No court ever seeks actually to find it; indeed, it is, as already shown, quite impossible to know it, since it never existed.

Sometimes a specific act of legislation is traceable to a single individual who has publicly stated at a

committee hearing what the act was sought to accomplish and in what manner. What the individual 'intended' and even what he has publicly declared are irrelevant. He would not be competent to testify concerning his intention, and it has happened that an interpretation reached was at variance with public declarations of the purpose of the draftsman.

Rules of construction. Not only do the courts supervise legislation either by means of legitimate or spurious interpretation but they have also established general rules for their own guidance in construing statutes. Some of these rules are the following:

If a statute has two possible meanings, one of which will produce a reasonable, and the other, an unreasonable, result, the construction which leads to a reasonable result will be preferred. It is easy to see that this rule is also one which favors spurious interpretation. Remedial statutes are liberally construed in the light of the antecedent situation. Penal statutes and statutes in derogation of the Common law are strictly construed. If, after exhausting the means of construction, an intelligible meaning can not be ascertained, the act will be pronounced void for uncertainty. This last rule also is one which applies to private jural acts evidenced by writings.

§ 42. Law and Other Sciences. Law considered as a social science is a part of a larger grouping called Sociology. The principal sciences (broad sense) to which the law is related are Ethic, Economics, Psychology, Politics, Epistemology, Es-thetic, and Logic.

Ethic. Ethic is a larger grouping which includes Morals and Law. It is the province of Ethic to put a valuation on all human conduct. In all ages,

ethical valuations have influenced the application of law. In the beginning, Law and Morals were confused, and before their differentiation, ethical valuation as distinct from moral judgment was hardly possible. The essence of Ethic, as distinguished from morals, is that it operates with reasoned judgment free from emotional bias. In its highest phases, it becomes one of the branches of Philosophy. Roman law once was strongly influenced by Stoic philosophy. Our own law bears much evidence of the influence of utilitarianism. So far as law is a conscious and voluntary process, it must relate itself to some system of ethical judgment and must justify itself as a part of a unity which embraces all reality. This need leads the way through ethic to philosophy and metaphysics. In this connection, we may recall the enormous literary output dealing with Natural Law of which a good sample in our language is found in Lorimer's "Institutes of Law." On the European continent, especially, Natural Law treatises flourished to a remarkable degree. Philosophy of law was identified with Natural Law, and it was the central idea of this philosophy that the law could be rationalized on an ethical basis. The Natural Law movement gave way to the historical movement, and more especially, to the juristic theories of the Historical School of Jurisprudence. The view that there is an ethical measure of just law still persists, and among the leading exponents of this view are Del Vecchio in Italy and Stammler in Germany.

Economics. As Berolzheimer has put it, Law is a form and Economics is its content. Legal rules deal to a large extent with matters having pecuniary significance, and, generally also, economic value. Sound law should be sound economics. Where legal

rules and economic truth differ, the administration of justice is likely to suffer. The importance of economics for the law is obvious, but yet, it must be noted that it is almost entirely neglected in nearly all fields where it is of importance. That economics can be neglected as an auxiliary science is also obvious. This neglect persists without impressing itself on the law maker chiefly for two reasons: (a) so far as legal rules are in contradiction of economic truth, economic life adjusts itself accordingly; (b) so far as such adjustments are not, or can not be, made they are represented by single instances, numerous in the aggregate, but never sufficiently important to affect social life in a conspicuous manner. There are various special fields of law and spheres of law control where economic truth is of first rate importance. Among these is the whole field of taxation (and, perhaps, especially, tariff legislation); public utility regulation; regulation of the conditions of employment; regulation of trusts; control of price and resale devices; usury laws; etc. Some of the greatest problems of constitutional law are, at foundation, problems primarily of economic policy rather than problems of technical law.

Psychology. Psychology has various important points of connection with the law. The efficacy of law itself depends on psychological facts. Legal rules affect human conduct through knowledge of them. The whole process of presenting facts to courts for an application is based on mental operations. The method of reaching conclusions is subjective. The law of evidence is a legally formulated special type of psychology. The art of the advocate is also an applied psychology having the purpose of persuading the triers of fact. It also plays an important part in persuasion in pure matters of law.

It is a somewhat curious fact that no effort has been made until recently, either by psychologists or others to demonstrate the scientific validity of the many psychological propositions that are applied in the administration of justice. It is not at all unlikely that many of the working ideas of the law based on supposed psychological truth are in fact erroneous. For the purpose of determining criminal responsibility, expert psychologists are often employed as witnesses, but the present system under which expert testimony in any of the outside sciences is employed, is on a highly unsatisfactory basis. Certainly there is much room for improvement. It may here also be observed that the law is distrustful of science and that even the most distinguished scientific expert or master would be treated as an ordinary witness when giving testimony concerning scientific facts. He would be required to make an oath that he will speak the truth.

Politics. Political science furnishes the facts concerning the structure of government. Law and political science are so closely connected that here the influence of science has been more conspicuous than at any other point of contact, but here, as at other points of contact, legal practice has always dominated political science and has often furnished practical illustrations of the social misfortunes that are produced by unscientific governmental structures. One of the chief reasons of the impotence of scientific truth in the realm of government is that governmental structures are not essentially creations to be modified at will in accordance with scientific facts. They are rather living social forms in which are incorporated all the forces of society, including the impulses that follow from the apprehension of what is true or desirable in conflict with what is desired

for its own sake. It is for that same reason that scientific changes in the law make their way with difficulty since truth and fact are always at grips with ignorance, selfishness, inertia, and even degeneracy. Scientific fact is, therefore, simply one of a great number of forces which determine the structures of government and of law. The process, taken as a whole, is not a rational one but rather a volitional one.

Epistemology. This science deals with the validity of knowledge. It is never consciously employed in the administration of law and, therefore, the point of contact is hardly obvious, but it is a metanomic substrate of all legal operations the investigation of which belongs properly to the jurist or the legal philosopher.

Esthetic. Esthetic has a somewhat more obvious connection with law than epistemology, but the relation to practical law is slight. This is especially true of legal rules which, until the most recent times, have refused to accord any legal value to form or beauty apart from commercial value. But like epistemology, esthetic has a metajural connection with law as an auxiliary of logic. The law practically is simply phenomenon and does not ordinarily concern itself officially with theories, definitions, or categories. Juristic science, however, in one of its aims of coördinating all legal phenomena into a unified whole, often must choose between competing theories, and, at this point, juristic esthetic is of great importance in furnishing the criteria of choice. Its principal canons are simplicity, completeness, and coherence. These criteria are no different than those for determining scientific truth elsewhere, whether in mathematics, mechanics, physics, or chemistry.

Logic. Logic has a connection with law, for some purposes, of major importance. In the creation of law by legislatures, logic of purpose is almost negligible. Legislative creation of law is volitional. Rational purpose is submerged in the conflicts of desire. Judicial creation and modification of legal rules, however, exhibits clearly the influence of logic. New rules are made or old rules are modified, consciously, under the influence of the legal structure as it now is, and modifications are made with a view of preserving its logical unity by the processes of subsumption or analogy, so far as that logical unity can be apprehended.

In its highest form, logic manifests itself in the application of law, so far as it does not involve the creation or modification of old rules. Whether, in fact, there are any actual rules of law is another question, but that there is a body of hypothetical rules, admits of no doubt. The process of applying law concretely in such a case is a deductive process. Without this logical process of reasoning, the work of the lawyer and the judge, would be thrown into a realm of chaos. The effort of the lawyer is to make safe predictions of future legal phenomena. The basis of these predictions is what may be discovered by logical operations on legal materials. Where the rule to be applied is not already clearly formulated, either generically or specifically, for a given case, resort is made to the logical processes of induction from other legal phenomena or to analogy. Frequently induction is aided by analogy. The deductive process, on the other hand, is much more simple. The logical method, therefore, is a traditional method for the application of law and any other possible method is foreign to the technic of legal prediction. For example, suppose a trial court in a

criminal case should give an instruction to a jury directing the jury to find the defendant guilty if they are convinced by a "clear preponderance of the evidence" (instead of saying "beyond a reasonable doubt"). On motion for new trial or on writ of error, the State's attorney would not make an experiment upon various groups to ascertain if they understood the difference between the instruction as given and as it should have been given. As a matter of fact, the average jurymen does not discriminate between 'preponderance of the evidence' and 'beyond a reasonable doubt.' The fact suggests that the ritualistic examination of instructions to juries in appellate courts is based on the illusion that in their finer distinctions of ideas, they actually determine the mental processes of jurymen who do not know the ordinary meaning of words. The fact remains, however, for the illustration put that the actual method employed in determining the question of error raised, is never an experimental method but a logical method, i. e. an effort to bring the concrete answer within the limits of a rule, and, for this instance, the answer is perfectly clear as the law now stands.

In somewhat recent years, a tendency has developed to belittle the very important function of logic in law. Two things are commonly confused (i) the legislative function, and (ii) the applicative function. In the legislative function, so far, at least, as concerns direct legislation (i. e. by the legislature) logic plays an insignificant part; but in the applicative function by the courts and lawyers, logic is of high importance, and the process of applying law would be incoherent and anarchic without it. The tendency to denigrate logic in law owes its origin to certain tendencies in philosophy beginning with

William James. The philosophy of pragmatism and pluralism had its outcrop in the now prevailing views of the relativity of our concepts of space and matter and of contingency in the so-called laws of nature. The old Aristotelean logic found a rival in a newer functional logic, and the old Euclidean geometry found competitors in various kinds of curvature geometries. The fact remains that nothing has been abrogated by this important eruption of ideas. The Aristotelean logic still remains true in its own field, and a part of that field is that of the application of law. In that field, the modern functional logic can not and will not enter, so long as law is administered on the basis of actual or hypothetical rules. In other respects, the newer sciences can and should have an important part in modifying legal institutions, but there is a real danger for the stability of our law if it comes to be believed that the contingency of rules of juridical law is of the same nature as the contingency of the laws of mechanics, physics, or chemistry. The effort to assimilate the two things is itself a failure to recognize the application of the principle of relativity. No doubt the postulate of the existence of legal rules, as a social fact, is an illusion, and, therefore, is untrue, but the legal process itself is fundamentally bottomed on that illusion. To attempt to change it would be to substitute a method functionally destructive of social values. What is illusion for social facts may be truth for legal science which is only an application of the principle of relativity, but, strangely enough, those who wish to abolish the Aristotelean logic from the application of law do not see that, in the name of relativity, they are furthering another form of absolutism.

The opposition to the older logic confuses method with truth. Logic is a method of thought but is not thought itself. The old logic assumes permanent values in the elements that enter into its method. The new logic assumes temporary and hypothetical values, but even in the new logic, the values attained are relatively permanent; they remain until a new fact compels a revaluation. Without this operation, there could be neither thought nor discussion. The point may be illustrated by the law of identity. Thus, *A* is *A*. If *A* is a changeless quantity, the proposition is undeniably true and always must so remain, but if *A* is a changing quantity, then the proposition must read *A* was *A* but is now *B*. The functional logic is especially valuable for growing sciences and progressive values, but it has no application in fields of thought that are static such as pure mathematics. The law also, hypothetically, at any given moment of time, is practically treated as static. There is no doubt, of course, that actually it is progressive, that it is in a state of unrest and change; but for purposes of prediction of future legal phenomena, the legal structure is treated as a logical unity in a state of arrest, out of which unity concrete applications may be forecasted. Legal prediction looks to future legal phenomena on a basis of logical interpretation of past phenomena. The physical sciences may disregard past phenomena entirely. They may start anew at any point, making new experiments and arriving at new interpretations. The law can not be administered in this way, but must proceed from what is given in the past. Of course, law could be administered on a basis of absolute free legal decision, where all past authority is annihilated, but it is plain to see that such a system would be unworkable in a modern legal society. We

already have an approach to that situation because of the overwhelming mass of our literary sources, but the method of legal reasoning still remains the same. It remains primarily a logical process. It can not be otherwise.

In connection with the new non-Euclidean geometries, it may be observed that no matter what the system is, whether asymptotic rotation, shear rotation, or circular rotation, it must have logical consistency. The universal necessity of logical method is one thing, and attribution of unchanging values to the elements that enter into thought, is quite another. We must accept the one, but we need not accept the other. For the application of law, it is inescapable that the process is, and must be, logical, even though we may suppose that the configuration of the changes which bear on our elements of reasoning must, for accuracy, submit to a method of treatment which, to use a mathematical figure, assumes an asymptotic form.

While the logical method is paramount for the lawyer, yet it must not be overlooked that in the application of law the logical method is often held in check by an intuitive process of thinking. These two methods, which are perpetual rivals, may be figuratively contrasted as the process of crystallization corresponding to the logical method and as the process of deliquescence corresponding to the intuitive method. The nature of this competition is the focal point of some of the sharpest differences of views among jurists and is the point of departure of an already extensive literature. Much of the difficulty on these points arises from a lack of clarification of the subject-matter of discussion. As we have seen, the subject-matter, Law, may mean any one of four distinct things. Each side, doubtless, claims too much,

The view taken here, summarily expressed, is that all legal rules tend toward a rigidity of logical form or crystallization, but that when they attain that form, the process of deliquescence overtakes them and then these forms break down or become modified. But, as against this fact, it must be emphasized that the professional lawyer must fix his problems in a frame of reference where they may be considered for the purposes of technical prediction. When the data fall in the field of discretion (as opposed to rule) the effort of technical prediction becomes one of great uncertainty. Apodictic certainty here is no more possible for the lawyer than for the pathologist dealing with the reactions of living tissue under abnormal disturbance. The two methods of logical crystallization and of contingent modification are two enduring factors of legal development. For Hypothetical law, the logical factor is uppermost as a method. For Becoming law, the controlling factor is an unconscious stream of social forces in which the elements of formal reasoning are merely the tints and the superficial motions of the stream.

Attitude of the law toward the external sciences. There are two kinds of fields with which the law has points of contact. One group is competitive; the other is not. The competitive group includes religion, morals, deportment, and fashion, which attempt to regulate human conduct. So far as the rules in these fields clash with legal rules, the law dominates. The non-competitive group includes such fields as logic, psychology, economics, and ethic. These fields present the conditions of human conduct, but they do not directly regulate it. There is never, therefore, any clash of rules with legal rules. Legal rules in purpose, often, no doubt, are in con-

flict with scientific truth, but purpose is no part of the rule itself, but only the explanation of its existence or of its meaning. In the field of regulation of human conduct, the law is supreme over all other sciences. The nature of law requires this supremacy, and, perhaps due to its authoritative position, there has been an undue tendency to ignore what science may contribute in making legal rules more effective and more conformable to the needs of society.

Since, however, the law, though supreme in the regulation of conduct, necessarily (e. g. in law making, in evidence of facts, in executive application) must come into touch with other fields of knowledge, it can not ignore them. All science and art are interrelated. Even the bricklayer who is constructing the wall of a building, is in contact with the truths of mechanics, mathematics, physics, chemistry, law, morals, and various other departments of knowledge. Now the question is, how much of this external knowledge is necessary for the administration of justice? It would be difficult to maintain that any more than a bare minimum of this knowledge is essential. Of these outside fields, which ones are the most important for the lawyer and the judge? It seems clear that those already above discussed, or some of them, fall within the answer—Logic, Ethic, Politics, and Economics. It may reasonably be asserted that the professional lawyer should especially be informed in these fields which touch most closely the field of law. This is a minimum program for a profession which has grown up under an apprentice tradition, and, as that tradition becomes fainter, this minimum program will submit to extension in various directions that make the administration of law more effective. What these extensions for the needs of a learned profession are, is obvious.

The question remains of the necessary equipment of the professional lawyer in those arts and sciences which lie beyond the immediate fields of direct contact. The short answer is, that the minimum equipment is enough acquaintance with these outside fields of knowledge to make them easily available through their own experts. And, here, also, an extension of knowledge beyond a bare minimum must be attained for our profession if it pretends to be a learned profession. The range of that extension must be such as to enable the lawyer to coördinate the truths of art and science in his own field, by a measure of independent judgment in the application of scientific truth.

We may illustrate what is minimal knowledge by saying that a lawyer should know enough mathematics to be able to avail himself of expert mathematical testimony; he should know at least enough about it to ask intelligent questions and to be able to interpret the answers. Again, in a personal injury suit, he should know enough of physiology and anatomy, at least *ad hoc*, to ask intelligent questions and to be able to interpret the professional answer. Put in another way, he should have enough equipment minimally in history, art, languages, science, and philosophy to be able quickly to gather what he needs when the occasion arises.

It would be an exaggerated demand to require of the professional lawyer, specialist ability in all the manifold fields of knowledge that are developed in litigation, but it is not excessive to expect a basis of general knowledge that will permit easy contact with the experts from whom the specialized knowledge must be obtained. It is common knowledge that law trials suffer from the lack of this knowledge and that the most competent experts in the sciences are

reluctant to submit themselves to the ordeals of testimony under conditions where the members of the bar are incompetent to develop scientific testimony. The fact suggests a great evil surrounding the legal establishment, beginning with the creation of legal rules and running through the whole professional operation of applying legal rules—the aid of non-legal sciences is either ignored or else is employed under conditions which the specialists in science can not accept with self-respect.

§ 43. **Nature of Law.** It has often been noted that the more fundamental a term or idea is, the greater is the difficulty of definition. This probably is due to the fact that a summum genus is indefinable and that as the genus is divided into species there lurks in the definition attempted, always the original obscurity of the highest genus which is carried down to all of its parts. In view of this logical difficulty and the further fact that law is a progressive institution having many inchoate and primitive forms leading up to the conditions of modern times, it is possible to say that a complete ultimate definition of law is hopeless. Yet, it may be observed, that literally hundreds of definitions have been advanced and no doubt nearly every one who has an acquaintance with legal phenomena has the feeling that a definition lies within the grasp of the mind. This feeling, however, rapidly vanishes when a concrete effort is made to undertake a definition that is more than a mere formula and the great array of definitions already available in systematic collections only serves to make conspicuous the difficulty, if not also the impossibility, of arriving at a correct solution.

Definition by essence. A proper definition must completely state the essence of the thing to be de-

fined. When we discover that essence in logic means proximate genus plus differentia we may perhaps be able to construct a simple definition of law, but we will not touch any of the real points in controversy that have arisen concerning it.

The proximate genus of law is a means or method for the control of human conduct. The genus includes ethic, morals, religion, and deportment. The differentia is a means authorized by the political state. Consolidated, a simple logical definition of law which disregards the properties and accidents of the thing defined, is a means for the control of human conduct authorized by the State.

It may be suggested with much plausibility that this definition which satisfies all the requirements of logical form is all that is necessary for the purposes of definition, as such, and that the difficulties that surround the concept should be attributed to their proper sources.

The definition proposed while formally correct is based on a hidden assumption that the genus has been properly stated. After all, is law a means of control? May not that be only a property and not in fact the essence? The real difficulty is not one of definition at all but one of isolating the thing to be defined. It is from this point that the crowd of existing definitions diverge.

The Law and a law. There is a distinction between a law and law simply. A law, in the strictest sense, is an abstract legal rule created by the legislature. There are also other more extensive meanings. The widest meaning of a law is any legal rule created or adopted by any agency of the State. In this wide sense, a rule stated by a commentator and adopted

in litigation is a law. A rule created by a court and city ordinances are further examples. A law then clearly is a legal rule.

A question much discussed is whether the law is only the sum total of legal rules or whether the law is also constituted of other elements than legal rules. The latter view is based on the fact that in the practical administration of justice, existing formulated rules frequently are not available and the rule to be applied is either then formulated or is implicit in the adjudication and is based on considerations of legislative policy, the reflected influence of custom, and even class ideals, and sometimes, even, is based on logical and material error or prejudice.

In spite of the undeniable fact that formulated legal rules for specific new cases are not as abundant as the great mass of our literary sources would suggest, the view to be preferred for strictly professional purposes would seem to be that one which regards the law as constituted of a sum total of legal rules.

Law as constituted of rules. In an attempt to define law the point of departure may be the cause of legal phenomena, the purpose of producing these phenomena, or the method by which these phenomena are produced. An effort may even be made to combine all of these points of departure into one definition. It may again be noted that the cardinal difficulty is to isolate the thing to be defined. Law is not an object knowable by the senses. It is a thing in motion. Among attempted definitions the prevailing ones are those that attempt to state, not the nature of the thing in motion, but the means by which these motions are produced. Such definitions coincide in regarding law as constituted of rules.

The type of definition which prevails among the leading jurists of our system of law, both American and English, is a restricted form of rule definition. According to this definition, law is the sum total of legal rules applied by the courts in the administration of justice. This definition, it will be seen, entirely eliminates the legislature, the executive, and other officers of government. This exclusion of all agencies of government but the courts, rests on the view that the test of validity of all acts of all officers of government is by judicial court action. That, however, is not entirely true. A governor in acting upon a warrant of extradition may pursue a course following executive precedents. A president acts in political matters entirely free from any interference by the courts. While legislation is subject to factual control by the courts when they make concrete application of it, yet the theory is otherwise and factually it would be difficult to affirm that legislatively constructed legal rules are not legal rules before application in the courts. And again, it is clear that in cases of legislative contempts and impeachment trials, the test of law is not with the courts, unless the definition itself is given a meaning broad enough to include other agencies of government than the courts, as courts, when making a decisional application of legal rules. That extension of meaning would seem to defeat the restriction of the definition, so far as it is limited to the courts. If that is the necessary consequence, then law is the sum total of legal rules.

Justification of the rule definition. On the assumption that the immediate object of law is to regulate human conduct, then regulation in a practical sense, as applied to intelligent human beings, can come

only through the existence of standards or rules which intelligent human beings can recognize as having the purpose of controlling their behavior. This is still true, even if law in the sense of rules is only the kind of law deprecated by Bentham as when a master whips his dog for an act after it is done with the idea that the dog will not offend again. Law may operate that way and a great deal of it does so operate. Where the creation of legal rules is *ex post facto*, they at least are legal rules for the future. Normally, however, that is not the method of operation. Legal rules usually operate prospectively so that the effect of conduct may be calculated in advance of acting.

The justification of this type of definition is that law simply as phenomenon would be meaningless and would be unsuited to be applied to intelligent human beings, unless it could be rationalized in the form of rules according to which the expectations of human conduct may be measured.

Nature of the rules which control conduct. If the assumption above made is correct that the purpose of law is to control human conduct in a rational manner; i. e. by means which will permit human beings to choose their conduct in accordance with an approachable standard, we are only led to the threshold of a new edifice of difficulties. What legal rules?

We have already seen that there are several complete bodies of legal rules, as follows:

(1) There is a body of ideal legal rules implicated by the Declaratory theory of precedent. This is the Ideal law. When one speaks of the law, the reference may be to this ideal law. In a practical sense, this meaning of law has no significance,

since it can never reliably be known. Human conduct can not be measured by it, and no one can calculate the future upon it. This body of legal rules may be dismissed at once as serving no purpose except to give form to the Declaratory theory or to serve the needs of rhetorical declamation.

(2) There is a body of legal rules which may be conceptually derived from actual legal phenomena. This is the Applied law. But law already applied is already legal history no matter how recent the phenomenon of application.

(3) There is a body of Hypothetical law. This body of law is based primarily on Applied law or such parts of it as rationally harmonize with a theory of probability of future legal phenomena. It should be clearly observed that Hypothetical law is not an official body of law. Only the legal phenomena upon which its constructions are based in whole or in part, are official. When a lawyer speaks of the law he usually has in mind two things: first, the Applied law, and second, the Hypothetical law. Commonly, the two are confused as if they were the same thing.

(4) Next, there are the legal phenomena, neither past nor future and yet partaking of both past and future, in the process of becoming, which is the law now actually being realized. This is the phenomenon which the profession seeks to forecast. These phenomena may be designated as the Becoming law.

(5) Lastly, there is the body of concepts existing in parallel course with legal phenomena in the course of becoming. This body of concepts is not the same as the body of concepts embraced by Hypothetical law. Hypothetical law is the professional forecast of these concepts of becoming law. The Conceptual becoming law also is not an official body of law. It

is simply a conceptual parallel of the becoming legal phenomena.

Of these five bodies of law—Ideal law, Applied law, Hypothetical law, Becoming law, and Conceptual becoming law—the only one that is official and dynamic is the Becoming law.

If the Becoming law is selected as the thing to be defined, then the law does not consist of a body of legal rules, and, moreover, there is no uniformity in these phenomena since contradictory phenomena will appear in the same moments of time within the same State, no distinction being made in the organ or agency which produces the legal phenomenon. On that view, the law is not a logical unity but a pluralism of facts.

If the Conceptual becoming law is selected as the thing to be defined, then the law is an unofficial body of concepts, but these concepts can never be known except as Applied law, and, as such, they will exhibit all the pluralism and contradiction of the phenomena themselves.

The Hypothetical law lacks official character and it only imperfectly measures future phenomena. It is often contradicted by the future fact. But hypothetical law has all the logical unity of Ideal law and has the advantage of accessibility to the professional mind. It suffers from a disadvantage of its own, in that each one may predict for himself the future course of legal phenomena. There can be no certain test of reliability for these predictions short of the phenomena themselves upon which the whole process is repeated in infinite succession.

§ 44. Schools of Jurisprudence. Based on differences of view of the nature or purpose of law, it has been usual to classify writers who have treated the

theory of law into various schools. These schools of jurisprudence, or, more accurately, schools of legal theory, may be grouped as follows:

I

II

The Materialist Conception The Idealist Conception

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|-----------------|-----------------|
| 1. Imperative | 4. Dogmatic |
| 2. Historical | 5. Rational |
| 3. Sociological | 6. Metaphysical |

(1) The Imperative school looks upon law as an emanation solely of the political State. Custom can not control or oppose statutory law. The political State is stronger than unorganized society and more powerful than other organized groups. Nothing can withstand the force of political society in the field of regulation of human conduct. If custom is approved by the State acting through governmental organs, then custom is received and thereafter becomes the law of the State. This theory grew up in our law and it affects the legal theory of custom. In our law, no custom can derogate from statutory law. In some European countries, on the contrary, custom is, in general, on an equal plane with legislation and may modify it or even annul it.

This theory is the product of various historical influences peculiar to our law. It is an absolutist theory, and, at least for the present age, attributes more power to the political State than it possesses. The political State is not omniscient. There are many things in the field of law which it could not successfully regulate. The State can not in practice ignore the wishes of powerfully organized minorities. It exists only because it successfully mediates between the conflicts of the social groups of which political society is constituted. The State,

in its material elements, is simply a specially organized kind of human society. It is the most powerful form of society in the expression of physical force, and it is the only kind of a society which is able with ultimate authority to make use of physical force to attain its ends. That the political state is socially omnipotent is clearly disproved by the fact of revolution.

The absolutist theory of the State is often confused with the imperative nature of legal rules. The two ideas are often treated as if they meant the same thing, while in truth they are in an important way entirely distinct and dissimilar. All legal rules without exception have an imperative character. Without this imperative quality, legal rules would cease to be legal rules. This, however, does not imply an absolute power of the State in the factual workability of legal rules. The imperative character of legal rules is a matter of inescapable juristic logic, but the imperative character of law is a socio-political theory. The one may be true and the other false. Many writers who have urged the imperative character of legal rules as reducing to a command or a prohibition, have been grouped erroneously as adherents of the imperative theory of law when the idea of absolutism of law was farthest from their books or their thoughts.

The leading representative of the Imperative theory of law is Hobbes.

(2) The Historical school puts all emphasis on custom, just as the Imperative view puts all emphasis on legislation. According to the Historical school, law is comparable to language; it is not a creation but a growth. Custom is not only custom but it is also law. The State is simply a political form which gives political effect to custom by or-

ganized methods. Custom existed before the political State; it springs from the life of the people and it is the living law. Since custom is a living product, it can not be confined in a rigid legislative form. All living structures exhibit the phenomenon of change and adaptation. Because of this fact, and because of the further fact that the law is intended to fit the needs of human society, the Historical school has always opposed legislation on a large scale and especially all efforts at codification. Before the law could be codified, the needs and wants of human society would have changed at important points and perhaps even as a whole, so that the effort to state law by way of codification as a living product which accurately corresponds with custom would resemble the Eleatic problem of Achilles and the tortoise. At each point of codification, it would be found that society had already in some measure moved forward in its wants and needs.

This view of the matter probably exaggerates the velocity of change, if not also the extent of it. No doubt, social wants and needs are perpetually unstable but the argument for legislation does not require that the discordance between law and custom shall become so great as to outweigh the advantages of certainty in the law. There are methods easily conceivable by which the discordance between law and fact could be reduced to a minimum.

There are, however, other reasons wholly unconnected with the theory of the Historical school which militate against attempts at codification, especially in our system of law. The effort may be likened to an attempt to construct a massive building without complete drawings, where the builder selects his materials at random judging their suitability by their superficial appearance. That such a building

would in many places exhibit grave defects of external form, stability, and internal harmony, is not more unlikely than the collapse of a code not conceived according to a juristic design.

Codification. While the theory of the Historical school that law is a matter of growth rather than of creation is unassailable, yet the influence of this school, dominant for nearly a century against the idea of codification, has fallen away. Much of the law of the civilized world is now reduced to legislative form. The era of *jus non scriptum* has passed. The only notable exception is the Anglo-American law, and, there, the process of legislation has already begun in the fields of Special law. This is a universal phenomenon. Special law submits to codification more easily and more effectively than General law. The reasons are easily apparent. Special law exhibits the greater need of codification and its problems are more insistently urged. Furthermore, the separate fields of Special law have a relatively small compass, making it possible to gather the relevant material in a short time. The various arguments against codification, as stated by Savigny and others, which prevailed in the period when the Historical school was regnant, are no longer seriously considered, and the only problem that remains is that of technical juristic expertness to put the raw materials of the *jus non scriptum* into a form that is not merely an alphabetical or mechanical arrangement.

There are various forms of codes differing in merit as they exhibit creative power to assemble the raw materials of the law into new form. These differences in degree of merit may be illustrated by considering three famous codes. The *corpus juris* of Justinian (528-532) was the poorest in scientific

merit. As Austin has said of it, it was "a body or heap (without scientific arrangement) of statute and judiciary law." Next in order of merit, is the Code Civil of France (1809). What this code gained in arrangement it lost in over-emphasized brevity without clarity of meaning. Next in order of merit is the German Civil Code (1896). This code is much superior to the others both in matter of form and of substance but even this effort which represents perhaps the highest juristic level of achievement of our own time, falls far short both in form and substance of what is desirable and of what is ideally attainable. It needs to be emphasized here that technical mastery of departments of the law does not suffice for the problem of codification. It is commonly assumed that anyone who is expertly familiar with the rules and policies of a field of law is for the same reason also expertly competent to arrange these rules into a scientific classification. The fields of jurisprudence and law are as distinct as architecture and brick-laying.

(3) The Historical school arose as a reaction against Natural law. It was supplanted by the Sociological school. The Sociological school emphasizes collisions of interests as the productive phenomenon of law. It does not deny the predominant power of political society to exert its will, nor does it deny the developing character of legal rules. The sociological jurist attempts to understand law not through a romantic formula of self-creation, but seeks to find the actual play of human forces which produce legal phenomena. The base of its theory is not unitary, as in the other schools, but syncretic. Law is constituted by a multiplicity of social facts as diverse as the qualities of the human mind and as various as the types of behavior. The sum total

of these social forces, conscious and unconscious, willed and unwilled, egoistic and altruistic, reasoned and unreasoned, are generalized as collisions of interests. The Imperative school singles out the State as the source of power. The Historical school deals with a homogeneous society expressing its spirit of legality. The Sociological school emphasizes groups, each having its own special interests or behavioristic force, coalescing and colliding with the interests and behavior of other groups.

The problem for the sociological jurist is to measure accurately these forces and to turn them into directions that will require the least expenditure of social force and the least amount of social friction. It is for the sociological jurist a problem of social mechanics or social engineering. The question of social efficiency—mitigation of material social evils—poverty, disease, criminality, waste—is more important than any abstract theory of justice. While the sociological jurist emphasizes the group struggle as the productive cause of legal phenomena, as the force to be reckoned with in accomplishing social objectives, yet the object and end of all social engineering is the welfare of society considered as an abstract entity and not the individual of flesh and blood. Society is the carrier of all the values that the individual may share and where the welfare of the individual man stands opposed to the welfare of society, the individual must go down. Good engineering requires this.

The social policy of the sociological jurist is comparable to the power of eminent domain. The rustic cottage may suffice to its occupant beyond all other satisfactions, but if a public road is necessary, the cottage will be swept away. This policy is not one which would disregard the individual entirely. It

would not inflict unnecessary harm on him, but it would require of him that he submerge himself in an abstract social entity where his individual wants conflict. For the rustic cottage there will be substituted a money equivalent. Property does not have merely individual value; it has also social value; and what society takes, it restores in another form.

In this feature, above others, lies the distinctive feature of the theory of the Sociological school. In the administration of justice the technical basis of the legal system is one of claims and powers. These claims and powers, in their turn, are not self-subsistent or absolute. They are claims and powers only so far as they fit into the scheme of the corporate character of human society. This is undeniably true and it is so true that some writers have gone to the length of seeking to abolish rights from the legal system. This program goes too far. Rights are the final expression in terms of relation of centers of social force represented by legal persons. To take away these points of reference expressed by jural relationship, would destroy the whole legal structure. Another solution may be substituted—to keep intact individual unitary relationships but to consider them as merely legal *points of reference to social purpose*. There is and must be middle ground between absolutism of rights and absolutism of social purpose.

The Sociological school exhibits numerous varieties of points of view and especially on the philosophical side with which it is contrasted in the above arrangement. Some of the representatives of this School representing different views are Jhering (historian), Kohler (philosopher), Menger (socialist), Duguit (publicist), and Pound (analyst).

(4) The Dogmatic School is contrasted with the Imperative school. The Dogmatic school assumes that the validity of law proceeds from Divine authority. The whole universe is subject to one ideal control and nothing that occurs or exists in the universe can differ in its final source. A leading exponent of this point of view is Stahl.

(5) The Rational school is systematically contrasted with the Historical school. The Dogmatic school is the oldest of jurisprudence schools, going back to the age when law and religion were identified. The Rational school is the oldest since the beginning of the secular era and it still survives in numerous forms.

The Rational view has chiefly two bases: (i) the nature basis and (ii) the logic basis. Positive law, i. e. the law that actually obtains, is an imperfect law; it is only an approximation to Rational law.

According to Ulpian, "Natural law is that taught by nature to animals. This law is not peculiar to the human species; it is common to all animals. We find in fact that animals in general, even wild beasts have knowledge of this law." According to Gaius, there is a "law which natural reason has set down for all of mankind and which is maintained equally by all men."

The Nature basis of law was much appealed to by Roman lawyers and there can be no doubt that a large part of all law is based on natural facts. Recognition of natural facts, however, is not the same thing as legal rules. Natural facts and human instincts can not be successfully ignored in the creation of legal rules, but they provide only limitations on the efficacy of rules and do not generate their substance. To illustrate the application, it was urged by Gaius that a boundary wall must, according to

natural reason, be owned in common. According to Martianus, if a will bequeaths slaves who have learned the art of hair dressing, the bequest includes those who have studied the art only two months, since learning is a perpetual process. According to Ulpian, legal relations are destroyed in the same way that they are created. This idea also appears in our own law in various forms. At common law, a sealed debt could only be discharged by a sealed release.

The Logic basis, especially, has numerous forms. According to St. Thomas Aquinas, Natural law is a derivative of Divine law. According to Hegel, Natural law is a part of an ideal cosmic process. According to Kant, Natural law is the product of categorical imperatives of reason. There are also varieties of Natural law which proceed without any further philosophical presuppositions from the standpoint of inviolability of human beings and which seek to build up a complete system of Rational law in all of its parts.

There are two kinds of Rational theories: (i) those that are based on an underlying philosophy which includes non-social elements; (ii) those that are based on social elements alone. The first is philosophical rationalism; the second is empirical rationalism. In another way, these numerous theories divide into (i) socialist theories and (ii) individualist theories.

In the 1600s and 1700s, the Rational school dominated all speculative thought concerning the law, and what is now known as Philosophy of law was then, even into the 1800s, based on Natural law. The literature of Natural law is very extensive in nearly all countries. The belief in Natural law in one form or another is not obsolete and the Rational-

ist view remains today one of the chief contenders for supremacy.

The Rationalist view has exerted marked influence on public and private law in all countries and it is the basis of modern international law. Our own public and private law at many points shows the clear influence of the Rationalist theory. Thus, to instance one familiar example, in the American Declaration of Independence it is boldly asserted—"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." It would be difficult to make a statement less self-evident or less true. Men are not created equal in anything. Whatever rights a man has, are bestowed upon him by political society and they are limited against him as to life, liberty, and the pursuit of happiness in whatever way the law can and sees fit. When we say a man has rights, we need not add that the law ought to regard these rights on an equality with similar rights in others. Recognition of the right is the measure of it, and as to rights asserted, it always has been factually true that the rights of the strong are better rights than the rights of the weak.

So far as such declarations implicate ethical desiderata they are useful but when taken as bases for law in operation, they can produce astonishing and undesirable results. If a starving workman applying at the entrance of a great industrial establishment for employment is free to pursue his happiness and to make any contract he pleases, he may then contract to waive the contributory negligence rule and the fellow servant doctrine at a bare subsistence wage. The workman here has unlimited

formal freedom but he has no material freedom. He may by his very necessities be compelled to endanger his life. The example put is, of course, an extreme one, but it illustrates what may occur if the individualist theory of formal freedom and formal legal equality is allowed to operate. Without attempting to consider here the merits of either side of the question, it will suffice to say that with the great growth of machine industry, the atomic theory of Natural rights has broken down and the social character of legal relations has begun to take its place.

Whatever may be said of other forms of the Rationalist theory, it is clear that the empirical, atomic theory as it was received in our early political and legal thinking is rapidly becoming obsolete and unworkable in various fields of the law.

(6) The Metaphysical school has as broad a base as that of the Sociological school with which it is systematically contrasted. The Sociological school takes for its starting point all of social facts. The Metaphysical school takes for its starting point all of reality. Law is specifically a social phenomenon in its field of operation; it is found only in societies; but it is not isolated from the remaining facts of the universe. This school differs from the others in giving to law a meaning not based on particular qualities, properties, or accidents, but a meaning derived from its ultimate nature in connection with all other phenomena. Accordingly, a metaphysician may also accept other theories of law so far as they fit his unified view of the nature of the universe and reality. He may, therefore, for other purposes be also grouped with the Historical school, the Rationalist school, or with the Sociological school.

There are three outstanding types of metaphysical theory: (1) Neo-Hegelian; (2) Neo-Kantian; and (3) Metaphysical positivism.

The Neo-Hegelian camp is a derivative, as the name indicates, of the Hegelian philosophy. One of its chief representatives was Kohler who also in other respects was representative of the point of view of the Sociological school. And here, it may be observed, that all views of the nature of law are merely introductory to a metaphysical theory of some sort, or, in other words, a theory organized into a philosophy.

The Neo-Kantian school is a derivative, as the name indicates, of the Kantian philosophy. Its chief representative in our own day is Stammler. This type of legal philosophy has produced one of the newer varieties of Natural law.

Metaphysical positivism, as the name implies, is a form of positivism reduced to ultimate terms. This point of view is represented by Ardigò and Vanni. Neo-Hegelianism is an inclusive system which undertakes to state the whole cosmic process in terms of a complete and coherent logical dialectic. Neo-Kantianism does not pretend to embrace the content of the world process or to understand its significance or purpose; it limits itself to the form of reality as given by the limited powers of human reason. Metaphysical positivism is a descending type of philosophical insight; it pretends no knowledge of the world process as a whole or even of the necessary logical form of this process, but proceeds from the basis of empirical facts which it seeks to organize systematically into provisional unities as points of direction leading to more ultimate affirmations.

Other terms of classification. In addition to the six schools of jurisprudence, the last of which, the Metaphysical school is also the point of departure of a classification of schools of legal philosophy, it has not been uncommon to include two others—the Analytical school and the Comparative school.

The Analytical school, chiefly represented by John Austin, represents essentially not a theory of law but rather a method of treating legal ideas. The Analytical school often is identified with the Imperative theory of law but this identification is erroneous. The analyst may hold the Imperative view or he may not. It is highly probable that the analyst of this age would deny the Imperative theory of law while he probably would affirm the imperative character of legal rules. There is, therefore, properly no Analytical school of jurisprudence. Analysis of legal ideas is necessary in all cases, regardless of the theory of law upon which these legal ideas are based. In a word, there is a juristic specialty known as Analytical jurisprudence which is the logical basis of all practical legal ideas, but the cultivation of this specialty does not in itself create a school in the sense of a theory of law.

What has just been said of the so-called Analytical method applies equally to the term Comparative school. There is a comparative method of dealing with legal ideas as was brilliantly shown by the researches of Maine in the past generation, but there is no Comparative school of jurisprudence in any accurate sense.

CHAPTER IV

JURAL ANALYSIS

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| § 45. Law and Human Relations. | § 53. Why Only Two Basic Relations? |
| § 46. Human Relations and Jural Relations. | § 54. Constraint in Legal Rules and Legal Relations. |
| § 47. Jural Relations are the Units of Legal Reasoning. | § 55. The Field of Freedom. |
| § 48. Nature of Jural Relationship. | § 56. Reciprocal Forms of Jural Relations. |
| § 49. Nomic and Anomic Relations. | § 57. Common Denominators. |
| § 50. The Claim-Duty Relation. | § 58. Forms of Negation. |
| § 51. The Power-Liability Relation. | § 59. Jural Facts. |
| § 52. Two Fundamental Jural Relations. | § 60. Elements of Jural Relationship. |
| | § 61. Jural Symbology. |
| | § 62. Zygonomic and Mesonomic Relations. |
| | § 63. Classes of Claims. |
| | § 64. Classes of Powers. |

§ 45. **Law and Human Relations.** Human relations long antedated the conscious idea of law. In early societies, behavior was conditioned by custom. Custom was not an instantaneous creation but grew up from collisions of interest in the clan, just as modern law grows and changes from case to case. The chief difference between clan custom and modern law was that custom in the clan did not involve the idea of a formal intervention or a formal sanction where the custom was infringed. Any violation of the customary rule encountered immediate reaction. Even the very rare instances where a clan member was expelled, did not present the idea of legal sanc-

tion but simply expressed the instinct of clan preservation. In clan life, the appeal was always directly to the custom and not to any idea of claim or right.

Clan custom was a primitive form of law. The first step in the development of law was reached with a division and integration of the clans into a larger social unit. This stage in law corresponds in its effects to division of labor in economics. The separation of social units developed the idea and practice of judicial arbitrament, just as division of labor created the need and use of money. In the primitive stage of law, the idea of custom operated directly upon human behavior without the need of formal appeal to the elders or reliance upon the principle of a claim or right against another. So, also, in primitive economics, each one bartered what he had created for what he could find, created by another, without recourse to an intermediate factor called money.

§ 46. Human Relations and Jural Relations. One of the objects of law is to standardize human relations. As we have seen, in primitive society, this object is accomplished directly, and, usually, automatically. In developed law, an intermediate factor enters into the regulation of human behavior. This intermediate factor is jural relationship. This factor is accentuated because law always manifests itself juridically in an abnormal aspect. Where human relations are concordant, law remains in the background. The great bulk of human activities are socially concordant, even when legally discordant. When social and legal discordance reach the point of asserted conflict, then the appeal is made to one's rights and not to the law. Where the clansman ap-

peals to the custom, the modern litigant asserts his rights.

In modern law, we have, therefore, to deal not simply with two ideas, custom and behavior, but with three ideas, law, behavior, and jural relations. Modern law can not effectually standardize behavior except by means of jural relationship. Human society has become economically too complex to rest on the methods of a primitive clan solidarity in attaining its ends even in the field of criminal law. Modern society requires not only a system of jural relationships created by law, but also a system of courts and executive officers, through whom these jural relationships may be protected. All the dormant and undifferentiated functions of primitive society have been brought into action and have become specialized. There are legislatures to create the law, courts to adjudicate controversies, executive officers to initiate prosecutions in criminal law and carry out the orders of the civil courts, and not least, an elaborate system of jural relations through which all of these specialized activities function to connect law and human behavior.

§ 47. Jural Relations are the Units of Legal Reasoning. Jural relations are for the lawyer what atoms and molecules are for the chemist. Every legal problem involves a complex of legal relations. Every legal decision is an adjustment of legal relations. Every new law creates new legal relations or fixes the conditions upon which such relations may be created. All legal operations deal with jural relations.

It will have been observed that these relations are sometimes designated 'jural' relations and at other times 'legal' relations. The distinction is that when

the relation is thought of in the abstract it is denominated a 'jural' relation, and when the relation is under discussion in a concrete application, it is denominated a 'legal' relation. There is no essential distinction otherwise; except, perhaps, that jural relations may be regarded as transcendental logical forms existing apart and anterior to phenomenal manifestations.

In analyzing jural relations, it is necessary, first of all, to discover the rule or rules of law which create them. These rules of law, as has already been shown, are in a professional sense only hypothetical and it follows, since jural relations are the creation of legal rules, that jural relations also are for professional purposes hypothetical. In the greater bulk of human behavior, however, the predicted rules are so reliably assumed as to point to virtual certainty. Accordingly, the jural relations involved in such rules also are correspondingly certain. The first step then in legal analysis is to discover all the legal rules governing the problem and next to determine what jural relations are involved in the particular facts. Where the rule and the facts are simple, the legal conclusion may be reached without any particular emphasis of the jural relation. But when the jural situation is complex, it is desirable that the jural relations be carefully isolated. Where new or novel problems are encountered, it is also desirable to isolate carefully the relevant jural relations. There is always a certain element of risk in shortening the process of legal reasoning by eliminating the factor of jural relationship. This risk runs in two directions: (a) the conclusion may rest on an unverified, hidden assumption of a jural relationship that does not exist; (b) the conclusion may

disregard a conflict of jural relations which, if fully apprehended, would change the result.

Every legal problem presents a complex of jural relations. The task of the lawyer is to analyze this complex into its constituent jural elements. A legal problem always presents a fact situation in an historical series. In this series, the jural relations that enter at the beginning may be essentially affected by fact-changes so that the legal results will differ from point to point. In this respect, the analytical labors of the lawyer differ from the analytical work of the chemist. The lawyer must account for each element in the complex from beginning to end. The chemist, on the contrary, usually, in his technical work, has only to analyze his substances at one point or at different points in a process.

These general ideas may be illustrated by a relatively simple problem. *A* lends his horse to *B* for thirty days, *B* promising to return the horse to *A* promptly at the end of the time. *B* fails to feed the horse properly and after the end of the term when the horse is now so ill that he will soon die, *A* sees the horse in *B*'s custody and tells *B* he will not accept the horse. What can *A* do? What can *B* do?

§ 48. Nature of Jural Relationship. A jural relation is one that the law will deal with either directly or indirectly. If *B* owes *A* \$100, there is a legal relation between *A* and *B*. If *B* does not pay, the law will inflict an evil (sanction) on *B* for his failure to pay. In the last analysis, a jural relation results in a restriction of the natural physical freedom of motion of a human being. There are two ways in which this natural freedom of motion may be affected. The first way is by compelling or requiring motion. This is illustrated by the above example of

a debt. The law requires the debtor to tender payment. Another way freedom is restricted is where a man is required by legal rule to refrain from acting, as where one owes a duty not to trespass on another's land. All legal duties require the doing of an act (i. e., a positive act) or require the refraining from doing an act (i. e., a negative act).

§ 49. Nomic and Anomic Relations. There are two kinds of relations—jural (or nomic) relations and non-jural (or anomic) relations. Nomic (from *nomos* = law) relations are based on anomic relations, but the technical operations of the law deal only with nomic relations. If *A* lends to *B* a sum of money, the physical series of acts produces a series of physical, psychic, and economic relations between *A* and *B*. These relations are anomic, since the law does not deal with them directly, but it is because of these underlying relations that the law creates nomic (i. e., jural) relations. The greater bulk of physical, psychic, and even of economic relations are not correlated by nomic relations. Thus, in our law, if *A* promises to lend to *B* a sum of money, there are created a series of physical, psychic, moral, and economic relations, but these facts do not create any nomic relation, since a bare promise of a loan without additional facts is not sufficient to put a legal constraint on either *A* or *B*. *A* does not owe a legal duty to tender the loan, nor does *B* owe a legal duty to accept the loan if it is tendered.

§ 50. The Claim-Duty Relation. The first basic type of jural relation has already been described. It consists of a claim with a correlative duty. If *A* has loaned to *B* \$100, *A* has a claim against *B* to have an equal sum tendered by *B*, or by someone

acting in his behalf. *B* owes a duty to tender or cause to be tendered to *A* the amount of the loan. This jural relation is called a Claim-Duty relation. Both the claim and the duty qualify the same act; i. e., motion proceeding toward *A*. The motion is due from *B*, but it may be performed by *B*'s representative. If the motion is symbolized by an arrow this relation may be shown by the following diagram:

$$\left[A \overset{+}{\leftarrow} B \right]$$

Here *A* is the dominus of the relation and *B* is the servus of the relation. The arrow shows a motion proceeding from the servus toward the dominus. Since actual physical motion is required by *B* (or on his behalf) the act (arrow) is shown as a positive act.

If *A* has a claim against *B* not to trespass on *A*'s land, the jural relation may be symbolized as follows:

$$\left[A \overset{-}{\leftarrow} B \right]$$

Here *B*'s duty is to refrain, or, in juristic language, to perform a negative act. In a physical sense, *B* is required to refrain from a given motion, but there is a convenience in analysis in considering the duty as one to do an act (i. e., a negative act), just as in mathematics there is a convenience in reckoning with negative quantities. We say, therefore, in the latter instance, that *A* has a claim to *B*'s performance of a negative act and that *B* owes to *A* a duty to perform that negative act.

It may be observed that when the duty is positive, it may be performed by the servus or by his representative. Where the duty is negative, it can only be performed by the servus. Where the duty is

negative, there may be a violation of that negative duty by *B*'s representative, but in this case, the breach of duty is not of the duty above stated, but of another duty that *B* owes to *A* not to permit *A*'s claim to be violated by the act of *B*'s representative. The two duties are juristically entirely distinct but there is an erroneous tendency in legal discussion to confuse them.

In the case of a Claim-Duty relation, it is perfectly clear that there is a legal constraint on the dominus of the relation affecting his natural physical freedom—he must physically do or refrain (i. e., he must perform a negative or a positive act).

§ 51. The Power-Liability Relation. We have seen that there are two forms of relation—one nomic and the other anomic. The law is not concerned with anomic relations except as they may be considered as of sufficient social importance to be the bases of nomic or jural relations. There are two fundamental kinds of jural relations—the Claim-Duty relation (already described) and the Power-Liability relation (now to be described).

In a Power-Liability relation, the dominus of the relation can act, whereby the act has a legal effect upon another person, called the servus of the relation. In other words, where one has a power, he is able by his act to change the existing legal position of another. If the act is represented by an arrow, the Power-Liability relation may be symbolized as follows:

$$\left[A \overset{+}{\rightarrow} B \right]$$

The above symbol (graph) indicates a positive act; for example, the dominus has the power to remove a trespasser from his land. There are also

negative powers. For example, if a disseised owner of land has a power to re-enter and does not enter, permitting the disseisor to gain title to the land by prescription, the failure to act is a negative act. This power to act is a jural power because it operates to change the legal position of the disseisor. Another illustration of a negative power is where one having an option to obligate another to a performance, does not exercise his option, whereby the other is released.

§ 52. Two Fundamental Jural Relations. It is, perhaps, a matter of astonishment when we think of the enormous breadth and depth of the law, with its varied subject-matter dealing with property, contracts, torts, family, inheritance, crimes, administration and procedure, and hundreds of specific economic and social relationships, the detail of which in our law is represented by thousands of printed books of authority, that all the relations embraced in this huge mass of situations, words, and ideas, reduce to just two fundamental elements—the Claim-Duty relation and the Power-Liability relation. The chemist, to explain the physical world, works with upwards of ninety elements, of which a few, such as carbon, hydrogen, oxygen, and nitrogen are of chief importance for organic life. The legal world seems hardly less complex, and yet, everything in it is founded on two basic ideas.

Legal situations are never presented to us in simple atomic form. They are like molecules or matter in physics. Jural analysis is primarily concerned with resolving these masses of legal matter into their constituent elements. Other branches of jurisprudence are concerned with dealing with these legal substances as they are presented in actual life,

as physical substances having certain properties for social purposes. The combination of the ultimate jural elements results in law, as in physics, in certain typical aggregates of relations. If we combine one atom of carbon and one atom of oxygen, we get carbon monoxide, a gas; if we combine one atom of carbon with two atoms of oxygen, we get carbon dioxide, another gas of entirely different properties. Two atoms of hydrogen and one atom of oxygen will produce water. Figuratively, the same phenomenon occurs in law. Certain typical combinations of jural relations produce certain typical legal ideas, such as estoppel, waiver, election, contract, and property. The variety of these legal ideas following the chemical analogy would suggest the impossibility of carrying out the comparison based simply on two elements. It would require considerable space to exploit the idea suggested, but it may be explained here that the arrangement of types of legal ideas corresponding to the varieties of matter in the organic and inorganic world, is made possible by reference to an element external to the two basic jural relations, called in juristic parlance, a thing-element. Without this factor, the range of ideas would be too limited to encompass the wide range of legal type ideas. It suffices here to know that all legal rules, all legal discussion, and all legal reality may be carried back to two irreducible jural elements.

§ 53. Why Only Two Basic Relations? This question will project itself to any inquiring mind. May there not be a further reduction to one element—a jural protyle? May there not be, in fact, three basic relations? And may there not be even four basic relations? In point of fact, each of the questions put, has found an affirmative answer.

There is support for the view that there is only one jural relation. This seems to be the view of Punt-schart, who asserts that the basic relation is between a human being and an external object, legal rules being made to govern the varieties of this fundamental type of relation. Windscheid supports the view that there are two jural relations. Salmond and Pound distinguish three jural relations. Terry and Hohfeld enumerate four jural relations. No jurist seems to have asserted the existence of more than four basic jural relations. The detail of this discussion must be put aside here and we shall now explain the basis of the affirmation of two basic jural relations. For those who like to explain reality by the working of two complementary forces or, as has been done by some writers, a male and female principle in the fundamental operations of the world, the explanation to follow will no doubt afford a basis for imaginative reasoning. We put the explanation, however, on purely logical and practical grounds.

The immediate effect of law is to regulate human conduct. Relation always means in its logical simplicity, a fact concerning two points of reference. There may, of course, be complex relations involving three or more points of reference, but these complex relations always reduce to two or more simple relations where one thing is related to another. Philosophers and logicians call one of these ultimate elements a referent and the other a relate. This idea of uniqueness and simplicity is the basis of all mathematical and logical reasoning, as it is also the basis of juristic reasoning. The proposition is fully accepted by philosophers and mathematicians and it may be accepted by jurists as a premiss for juristic constructions. That being disposed of without entering into the detail of the matter, we come back

to our other postulate that law governs or attempts to govern in one way and another, human conduct.

Since human conduct must be reduced to a relation of one person to another person, we must now discover in what way or ways conduct may be manifested. Conduct means activity or lack of activity—in other words—positive or negative acts. Since there can be but two persons in any relation, conduct can have only two possible directions from the standpoint of legal effects. Either *A* affects *B* by acting or *B* affects *A* by acting. There can be no third possibility as between *A* and *B* to produce legal consequences as between *A* and *B*.

Another consideration, however, enters at this point. Juridical law, unlike nature's law, is always anticipatory—it operates only on future conduct and it operates only contingently. Nature's laws, if we knew enough about them, might also be found to operate in the same manner. These two features of juridical law—(a) futurity and (b) contingency—may be quickly discerned. Rules are intended to govern conduct, and it is apparent that no rule of law can govern past conduct. Law can not govern even present conduct unless the rule is anterior to the conduct, wherefore the proposition of futurity in the operation of the rule is manifested. Rules of law also operate contingently, since the rule may be obeyed or disobeyed.

The factor of futurity in the influence of rules of law on conduct involves two ideas—(a) deferred conduct and (b) obligatory conduct. It involves the idea of a claim to an act and the duty to perform that act. The act, as we have seen, may be either positive or negative. This analysis accounts for one of the two basic relations.

The other relation now remains to be discovered from the same materials. Since a duty to act may be disobeyed, law in its mission of regulating human conduct, must provide some way to overcome the results of legal misconduct. This is brought about by means of the Power-Liability relation. The Claim-Duty relation is a *must* relation; the servus of the relation must do something by command of law for the dominus of the relation (e. g., duty to tender money or services). The Power-Liability relation is a *can* relation. The dominus of the relation can do an act with legal effect against the servus of the relation (e. g., power to sue, power to arrest, power to eject a trespasser).

The result of this analysis of legal conduct is that there is one case where a person *must* do an act for another, and another case where one *can* do an act against another. There is no other possibility that can enter into the idea of jural relationship. As shown, there can be but two persons in a relation and the act which gives the nature of the relation can produce legal effects only between these two persons. In a word, there can be only one possible direction in a jural relation, i. e., from the person acting toward the one acted against. This single idea of motion in only one direction is qualified by the necessary idea that the motion *must* be made, or by the idea that it *can* be made.

§ 54. Constraint in Legal Rules and Legal Relations. An immense amount of controversial writing may be found discussing the question whether law operates only by way of command, or whether it does not also permit and authorize conduct. The existence of this body of literature can only be explained as due to a failure to note accurately the

jural relations created by law. It seems entirely clear that in one class of cases one must act, i. e., he is commanded to act (either positively or negatively); in another group of instances one can act against another with legal effect. Law, therefore, creates duties and it also creates powers. If *B* owes *A* a sum of money, the law in effect commands *B* to pay it. If *B* does not tender payment, *A* has a power to sue. The law does not command *A* to sue and he commits no breach of duty to *B* if *A* does not sue. The law, moreover, does not cast any duty on *B*, the debtor, in any way to assist in *A*'s power to sue. Here the law simply authorizes.

The law, therefore, in the regulation of human conduct, functions in two ways—it prescribes conduct and it authorizes conduct. But it must be noticed that when the law authorizes conduct, there is constraint, just as clearly as where the law commands conduct, since the result produced by the exercise of a power is a result which must be accepted. If the creditor sues, the debtor must suffer the disadvantages of that act. If the creditor holds a chattel which he has improved for the debtor, the creditor may continue to hold the chattel until tender of payment. The debtor must suffer the disadvantage of that exercise of power. This is true in all cases of power.

All lawful powers are accompanied by duties, not only (commonly) as to the result, but also as to the exercise of the power. There is no duty to assist in the exercise of a lawful power, but there is a duty not to interfere in the exercise of it. If a creditor, having authority, sells a chattel held as collateral security, the debtor owes a duty to the purchaser not to interfere with the chattel after title has passed. Here a duty follows as a result of the exercise of a

power. If the creditor is in the act of selling the chattel held as collateral, the debtor owes a duty not to interfere with the sale. Here a duty accompanies the exercise of an adverse power.

In the interaction of Duty and Power, the primary emphasis is clearly on Duty, since the object of law in regulating conduct is to have its commands carried out. In this social process, powers are only secondary. They exist for the purpose of creating, changing, or destroying duties. To use a figure of speech, duties are the passive factors and powers the active factors of law. Duties show what must be done, but powers create, change, and destroy duties.

Every jural relation involves constraint. This constraint is clearly shown in all duties. In duties the constraint is direct. The duty must be performed. In powers the constraint is indirect. The result of the exercise of the power must be suffered either by way of creation or modification of a duty, or else by the destruction of a duty. The latter element is illustrated by the necessary killing of a dangerous animal owned by another. The destruction of the animal is also the destruction of the duty owed to the owner of it. The process of interaction of Duty and Power (the active elements of their respective relations) may be likened to the forward linear movement of a wheel divided into two segments. As one segment rises and declines, the other segment declines and rises correspondingly. As the moving wheel progresses, new fields of space are reached where new segments of space corresponding to Duty and Power are attained.

It has been shown that the two possible types of jural relations both involve an element of legal constraint. Since these two relations are produced by

rules of law, the rules of law also constrain. This alone does not prove that all legal rules have a constraining force, but this conclusion does follow from the fact that the sole purpose and effect of rules of law is to create the two jural relations of Duty and Power.

§ 55. The Field of Freedom. The controversial literature referred to above also includes, in addition to compulsory conduct (duties) and authorized conduct (powers), the field of permissive conduct (freedom). Now it can not be denied, that freedom is a different idea from duty or authority (power). It can not be denied, either, that it is a species of conduct. Yet freedom (as the external side of will or liberty) is not in the area of law. Law deals only with the field of constraint; it does not include the wider field of non-constraint. Each art, science, and discipline marks out its own affirmative content. Sometimes the border lines of contiguous fields of art and science are not very clear. Thus, it is not easy to separate sharply the fields of botany and zoölogy or of physics and chemistry. This is a defect suffered by all departments of knowledge which deal with material reality. It does not, however, hold for the mental sciences or for a science which may be built up on mental postulates. There is no difficulty in sharply separating the elements added to arithmetic, of algebra, or of geometry. Likewise in law, there is no difficulty in separating distinctly the areas of conduct affected by State constraint from conduct not affected by State constraint. There is not the slightest difficulty in differentiating freedom from duty and power. There is no obscure line, since the conceptual elements are entirely clear.

The possibility of this separation of content, and even of sharp separation, between constraining con-

duct and non-constraining conduct is hardly controverted, but the view is sometimes argued that free conduct is as much a part of law as constrained conduct. It does not seem difficult to show that this position is incorrect. To illustrate, a writer may use his pen to write upon his paper. Nothing will be found in the law that commands the act or which prohibits it. It is free conduct. There is no constraint to write or not to write. Whether the writer writes or whether he does not write, does not produce any legal effect, either upon him or upon any other person, assuming that what is written does not have that effect for purposes of copyright, libel, etc.

But it is said that many instances will be found in reported cases, and even in statutes and codes, where free conduct is mentioned. It is sufficient to say that when free conduct is discussed it is only for the purpose of excluding it from law. It will also be discovered if any such instance is examined in detail that the very process by which free conduct is excluded is one which operates with a jural relation. If *A* sues *B* on an unfounded claim, the court constrains *A* from proceeding, because he has violated a legal duty. In this instance, and no stronger one can be found, the free conduct does not even come directly before the court. The court's function, as a court, is fulfilled when it pronounces upon the plaintiff's illegal conduct. The effect, of course, practically is to show judicially that the defendant's conduct was free conduct.

Law is simply a method of protecting freedom. The whole purpose of creating the right of ownership, for example, is to protect the freedom of the owner in what he owns. If the owner of land plows the land, the act, for legal purposes, affects no one but the owner himself. There is lacking that double

point of reference which is necessary for a relation. The owner's freedom is protected by duties of others not to interfere with the land or with the owner. These duties are also fortified by powers. If a trespasser invades the land, the owner has the legal power to eject him, or the legal power to sue for the trespass.

The domain of freedom is protected by the wall of jural relations. It also marks the boundaries of law.

§ 56. Reciprocal Forms of Jural Relations. We have seen that there are only two basic jural relations. Our object here is to show that each of them has one reciprocal form, thereby producing two derivative jural relations.

The Immunity-Disability relation. If B owes A the duty not to invade his domain of freedom by committing a fraud, the relation may be shown by the following graph:

$$\left[A \overleftarrow{\quad} B \right]$$

Here A is the dominus and B is the servus of the relation. The content (act) of the relation is negative, as shown by a minus arrow. B is constrained by law to perform a negative act affecting A . Since all matter is in constant motion, and since human beings likewise exhibit bodily and mental movements during the whole period of life, the duty in effect is affirmative as to B . B must so control his movements as not to work a fraud on A . Fraud may be accomplished by silence and inaction, as well as by speech and action. The graph shows that B owes to A a negative duty, which, by hypothesis, is taken to be a duty not to harm A by fraud.

The same idea may be expressed in a reciprocal form, as follows:

$$[A] \overset{+}{\leftarrow} B$$

The inner bracket opposite A shows that the act can be obstructed. When A can claim a duty to perform a *negative* act, he can, also, with the law's support, obstruct the *positive* form of the same act. In other words, if B owes A a duty to perform the negative act, he is at the same time disabled by law (because of his duty) to do the positive of that act. The relation last shown is called an Immunity-Disability relation. A has an immunity from the positive act (fraud) and B has a disability to do the positive act.

Every Claim-Duty relation reciprocates with a corresponding Immunity-Disability relation. The reverse is also true. In professional speech, this reciprocation of ideas is not commonly employed. Usually one of the forms is selected in advance, due to habit, and it has not been recognized that in fact one form is exactly equivalent to another in legal effect. Where the term Immunity is used by lawyers, instead of the term Claim (or Right), with which it reciprocates, usage has confined it to the positive form. Thus, lawyers speak of immunity from arrest, or immunity from a wrongful levy. It may be quickly seen and verified that this immunity is only a claim to the contrary form of act. If a man is immune from arrest, he has a claim that he shall not be arrested. There is a correlative duty not to make the arrest, and, likewise, a disability to make the arrest.

This idea of reciprocation in designating jural relations is not a refinement introduced by jurists, but is a natural development in legic speech. The ex-

planation for this duality, perhaps, is that it is easier for the mind to focus on affirmative (positive) acts than on negative acts. The mental obstruction here appears to be analogous to the difficulty of manipulating minus quantities in mathematics.

The Privilege-Inability relation. If A has a power to enter B 's land by way of license or easement (e. g., right of way) the relation as expressed may be shown by the following graph:

$$\left[A \overset{+}{\rightarrow} B \right]$$

Here A is the dominus and B is the servus. The content (act) of the relation is positive, as shown by the plus arrow. A may invade B 's domain of freedom by doing a positive act; i. e., A may enter on B 's land. B is constrained to suffer A 's act of entry; i. e., B must permit A to enter; i. e., he is liable to have the entry made. The same idea may be symbolized by a reciprocal graph, as follows:

$$\left[A \right] \overset{-}{\rightarrow} B$$

The inner bracket opposite A shows that the act can be obstructed. In other words, A , with the support of the law, can decline to perform the negative act, i. e., of not entering on B 's land. Except for his license or easement, A would owe a duty to B not to enter. By virtue of the license or easement, A can do the very thing that otherwise would have been a breach of duty. A 's legal advantage here is called a privilege, and B 's legal disadvantage is called an inability. A has a privilege to decline not to enter B 's land, and B is unable to require the negative act of not entering.

It may be quickly verified that in the two graphs last above shown, the power of A is exactly equiva-

lent in legal effect to his privilege. It may also be seen that *B*'s liability to have the entry is exactly equivalent to his inability to prevent it.

The latter form of reciprocation is somewhat more difficult than the first one, in that a negative content is emphasized in a positive form. Thus, 'privilege to enter' really means, as the symbol shows, 'privilege to *not not* enter.' It involves a double negative. The expression conventionally used combines the idea of privilege (as an exemption from duty) with the idea of power.

All powers reciprocate with privilege, but the tendency in professional speech is to confine the term privilege to forms of power which confer a special advantage on the dominus not enjoyed in general; in other words, exemption from duty where duty is the normal situation.

§ 57. **Common Denominators.** We have up to this point isolated two basic jural relations having two reciprocal forms. These four forms of relations necessarily require eight terms to designate the legal advantages of the dominus and the legal disadvantages of the servus. The common denominators may now be introduced by the following table:

Rights.	Authorities	Claim	—	Duty	Responsi- bilities	{ <i>Ligations</i>
		Power	—	Liability		
	Exemptions	Immunity	—	Disability	<i>Debilities</i>	
		Privilege	—	<i>Inability</i>		

This table, containing fourteen terms, will enable us to designate any legal relation which can or does exist. It also enables us to express these ideas in two generic orders of synonyms. It also enables us

to express the negation of any particular legal relation in the same way.

It needs to be stated that this particular arrangement of terms is accepted in detail and without exception by only a few persons and that in actual professional discourse, several of these terms (the ones in italics) have not been used at all as terms of art. It must also be observed as a matter of caution that in professional discourse all of the terms actually in use have a flexible operation so that it is often difficult to identify the particular legal relation under consideration. This situation especially as to these, the primary terms, is very unfortunate and doubtless results in many instances in faulty technical operations.

The process of legal reasoning is one dealing with words as symbols of thought. There is already so great a degree of separation between symbols and reality that great pains must be exerted to use symbols as accurately fashioned and applied as possible, to avoid a greater margin of possible error. The suggestion is unthinkable that because at the present moment there is no generally accepted system of terms for the basic jural relations that no effort should be made to find such a system. Legal reasoning can be reduced to a more reliable method than now prevails and the question whether the above formulation of terms is likely to be accepted by practicing lawyers is of no importance whatever. If it is an accurate formal schema of the basic ideas, that in itself suffices, since it may be employed by anyone who is willing to take the trouble to master it for his own private use in an analysis of legal problems, even though in the communication of legal ideas it may be necessary to translate the terms and the process of using them into another less accurate

medium of thought. One might just as well say that if algebra were now just discovered that no one should use it because the universal custom is to use arithmetical symbols.

Reverting now to the above table of fourteen terms, we may notice in detail some of its features.

Fundamental Relations. As has been stated, there are two basic relations—the Claim-Duty relation and the Power-Liability relation. These two fundamental relations may be mechanically transformed into two other relations. By reciprocation the Claim-Duty relation is an Immunity-Disability relation; and similarly the Power-Liability relation becomes a Privilege-Inability relation. This process of reciprocation is an important one in that it enables us to view any given single legal relation from the angle most easy to understand and with terms necessary to express the precise idea which arises. In juristic analysis, especially a juristic analysis expressed by graphs in a linear series (to be shown), it will be convenient to express all jural relations simply in the two basic forms, transmuting the two other derivative forms by reciprocation. This method should, however, never be attempted until all the forms by frequent manipulation of them become thoroughly familiar.

Correlatives. Claim and Duty are correlative. They refer in any given jural relation to precisely the same content (act). If there is a Claim, there must be a Duty. If there is a Duty, there must be a Claim. It is impossible that either idea can exist alone, since a relation can not exist without two terms.

Some writers suppose that while Duty is a normal correlative of Claim, there is an abnormal correl-

ative of Claim in Wrong. In Blackstone's Commentaries the basis of classification is Rights (claims, etc.) and Wrongs. In Blackstone's day the ideas of jural analysis were in their infancy, at least in England, and the backwardness of these ideas even now is due primarily to our literary traditions. The language of the books we read is the authoritative basis of our spoken language.

A Wrong is not a terminal element of a legal relation of any sort, and the contrast of Duty and Wrong is entirely erroneous. There can be no such thing as a Wrong relation. There are no other kinds of jural relations beyond those above set out. A Wrong is simply a kind of act. When done, it creates one or more of the legal relations enumerated. A wrongful act may, however, be the content of a jural relation. Thus, *A* has the power to commit a battery on *B*.

$$(A \overset{+}{\rightarrow} B)$$

Here the content of the relation is a wrongful act. *B* is liable to suffer the disadvantage of having a tort committed.

Doubt will arise whether such a relation should be called a jural relation. Since a wrongful act will have legal consequences, it is not only convenient but necessary to take note of relations with an unlawful act. The practical manifestations of law in the courts are always concerned with abnormality. Law as administered by the courts is comparable to surgery; it deals only with pathological conditions.

Each of these four groups of jural relations has two correlatives. Where they are spoken of separately they may be called jural terminals. Thus, the jural terminal, Claim, has for its correlative the jural terminal, Duty.

Denominators. In the above table there are six common denominators. Four of them (Authorities, Responsibilities, Exemptions, and Debilities) are mediate. The remaining two (Rights and Ligations) are ultimate or the highest common denominators. All jural relations reduce in their ultimate terms to Rights and Ligations.

In literature, synonyms are used for emotional or esthetic effect. To some extent the denominators may serve the same purpose, but their scientific function is to enable us accurately to group and separate common legal ideas.

Cross Conversion. The mediate denominators may be made to serve another very useful purpose. They may be used as affirmative terms to express a negative. Suppose we wish to say that a man "has no claim to a performance" in another form of words. If he has no claim, then he has no authority. No authority is a Debility. We may, therefore, say that the man is "under a debility," etc. If one could become hardened to it, we might say even more compendiously "he is Debile," etc. Again, if a man is not under a Debility (in a given situation) he has Authority. Or again, if he is not under a Disability, he has Authority. Again, if a man is free from duty, he is Exempt. Again, if he has no immunity, he is Responsible.

This process, which may be called Cross Conversion of Negatives, needs no justification. It is a method by which legal language can be enriched without the risk of inaccuracy. One has but to observe what may be observed in the prevailing usage. In this aspect, it is simply chaos. This process is called Cross Conversion for this reason: If an X is drawn and the mediate denominators are placed at the points of the X in the same arrangement as

shown in the above table, the term of conversion is mechanically found at the opposite point.

An important word of caution is necessary here. The specific terms, Claim, Duty, etc. may be terms negated but they must never be used as the products of conversion. For example, we can never say that the absence of claim or power or authority is disability or inability. We are restricted for this instance to the term Debility. In other words, where Cross Conversion is used *it must result in a mediate denominator*. But we may start from a specific term such as Claim or Inability, or we may start from a class term such as Exemption or Responsibility. Logical word analysis of these terms will show that the process of Cross Conversion is logically accurate. One example will suffice. If a man has no Debility in a given reference he must have Authority in that reference.

§ 58. Forms of Negation. We have dealt last above with the process of Cross Conversion. The essence of this process is to take a negative of a specific or of a class term and to transform it into a positive term. The product of conversion will always be a class term limited to the mediate denominators. It is a linguistic device for enriching the field of our terms without multiplying them. The problem here is remotely analogous to the problem of inflected and analytic languages. The English language in its early stages was an inflected language like Latin and Greek. It has now become analytic and agglutinative.

For the process of Cross Conversion we might substitute a new set of terms to express the products of conversion. But these terms would need to be invented, or in the alternative, existing words would

need to be appropriated to serve these functions. This would be allowable but it would multiply the apparatus of operative terms. We believe the method adopted is preferable. When we say this, we have no expectation that any system created by logical methods such as the process of Cross Conversion has the slightest measurable prospect of acceptance, but it may still serve a very useful purpose for individual thinking and analysis, since it ministers both to an economy of ideas and to accuracy in their manipulation.

General Negatives. These negatives are very simple. They are constructed by adding simply the word 'no' or 'not' to any one of the fourteen terms in the above table. Thus: No-Right, No-Authority, No-Claim, or No-Ligation, No-Responsibility, No-Duty. A general negative never directly indicates another legal idea; its sole function is to exclude a legal idea. In this respect, it is not different from the negative used in Cross Conversion. If we say 'No-Duty' the idea in effect is the same as saying 'exempt from duty.' There are different shades of meaning in the collateral reference but nothing more. It is seen also that the negative expressed by the process of Cross Conversion is more complex since it employs two terms in the table to state it. There is no difficulty in quickly getting accustomed to the process and it will be found helpful for precision in making a statement of a legal situation. In addition to these two verbal forms of negation, there is still a third, now to be explained.

Juristic Conversion. Juristic conversion is the transmutation of one specific legal idea into another specific legal idea. Suppose that *A* has an easement of travel to pass over *B*'s land. Here, with refer-

ence to the act in question, *A* has (or owes) to *B* no duty (general negative); *A* is exempt from duty to *B* not to pass over *B*'s land (cross conversion); *A* has a privilege to pass over the land (juristic conversion).

Each of these statements is entirely accurate and each one precisely expresses the legal truth on the facts assumed. Each form may have its convenience and also its need. The latter form (juristic conversion) expresses at one stroke both a negative (i. e., here, of a duty) and also the affirmation of a specific capability (i. e., privilege).

Juristic conversion is limited to the eight central terms in the above table. It is a more complex form of cross conversion. Each of the eight central terms may be transformed into another definite one of the remaining central terms.

The process of juristic conversion, while somewhat complex in analysis in detail, may very easily be used in a mechanical way with unfailing accuracy. Note the following diagram:

$$\begin{array}{l} (1) \quad B \left[\begin{array}{c} D \xleftarrow{+} S \\ \hline \end{array} \right] A \\ (2) \quad A \left[\begin{array}{c} D \xrightarrow{-} S \\ \hline \end{array} \right] B \end{array}$$

In the first graph there is shown a Claim-Duty relation. The act may be either positive or negative, depending on what the act (content) is. The second graph shows a Power-Liability relation where the content may be either negative or positive.

Let us take the example last put (*A*'s easement against *B*). *A* is the dominus (*D*) of the easement relation and *B* is the servus (*S*). *A* owes *B* no duty not to pass etc. This negatives the existence of the

first graph. Necessarily, if A does not owe a duty not to pass etc., then A has a power to pass. This is an affirmation of the existence of the second graph. Now we could rest here and the result would be correct, but there is a well established practice of legal language to express the same legal note with a different legal overtone. A 's capability instead merely of being called a power, is called a privilege. A owes B no duty not to pass etc.; therefore, A has a privilege to decline not to pass. This is illustrated by the following graph:

$$A [D] \neg \rightarrow S] B$$

This is one of the most difficult of the preliminary operations in jural analysis and care should be taken to master the problem with complete insight. Here it will be seen that the negation of a specific duty is the exact jural negative of the privilege to decline *not* to pass. It must be declared that the unusual complication of this locution is not the invention of any jurist. It is a curious verbal phenomenon which has unconsciously grown up in legal parlance. It may be said to manifest a spirit of legal logic working in our ideas and our words without conscious intervention. The only part that any jurist has had in it is to discover the hidden logical meaning of the phenomenon.

In law, as also in algebra, for example, we take the trouble once to understand how and why our formulas are constructed and thereafter we are content to fall back on the formula when we find the need to use it, without reanalysis. The quick mechanical formula for transmuting the negation of any one of the eight central jural terms is to change the *direction* of the act and to attach to it the re-

cessive bracket or to eliminate it if the first term had it. Let us now test the formula by taking another central term for conversion. Suppose *A* is immune from arrest by *B*. The graph is:

$$\left[A \right] \overset{+}{\leftarrow} B$$

We want to find the specific term that is the jural negative of *A*'s immunity. Following the formula, we reverse the act (and the parties) and eliminate the recessive bracket, resulting in—

$$\left[B \overset{+}{\rightarrow} A \right]$$

By this manipulation, *A*'s immunity is converted into *A*'s liability and *B*'s disability is converted into *B*'s power. The result is correct, since it is clear, if *A* has no immunity against arrest by *B*, that *B* has the power to arrest *A*, and that *A* bears the liability to be arrested. The contrary, also, is equally true. If *B* has no power to make the arrest, then *A* is immune against the arrest.

The process of juristic conversion is directly connected with the process of reciprocation. Without reciprocation, the process would be very simple. No-Duty would be power simply and No-Claim would be liability. This will be seen by inspecting the following diagram:

$$(1) \left[B \overset{-}{\leftarrow} A \right]$$

$$(2) \left[A \overset{+}{\rightarrow} B \right]$$

Taking again the easement example, if *A* does not owe *B* the duty not to enter, then *A* has the power against *B* to enter. There is one difference here—

the sign of the act changes. The duty act negated was negative; the power act necessarily affirmed is positive. Where the conversion is fully carried out as earlier shown, the sign of the act does not change, but the same effect (i. e., change) is produced by the recessive bracket.

If the reader, perchance, becomes wearied over these manipulations, it may be stated, that they can not be avoided, since they are inherent in the play of legal ideas. Moreover, any science, as a price of certainty and reliability, must resort to similar forms for expressing reality. Algebra, with which there are certain resemblances in jural analysis, demands similar patience in becoming acquainted with its symbols and formulas for its own operations before we can make use of it.

§ 59. Jural Facts. In jural analysis, it is necessary to deal not only with jural relations, but also with jural facts. Jural facts are the jural causes of jural relations. No jural relation can come into existence without a precedent jural fact to create it. All jural relations (rights) have two life phases. They are born and they die. There is no exception to this rule. Some rights, however, grow or decrease, considered as complexes.

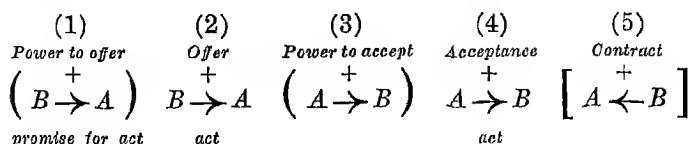
These points may be illustrated by a familiar example. When a person is born, he becomes invested with the right of corporal integrity. This right may be considered as a complex or it may be considered as a simple, unitary right. In the complex right, the person born is the dominus of the right, but the servi will be all other human beings. There will be similar negative duties converging from all other human beings to the dominus. There will be the human beings then born and the human beings born

later in the lifetime of the dominus. The right of corporal integrity is constantly growing in bulk, assuming that the population constantly increases, but it is also constantly changing, since human beings are constantly dying and other new human beings are constantly coming into existence. It is a matter of convenience to look upon this right in this fashion, since the main thing is the corporal integrity itself, and the object of the right that protects it, is to create a legal situation where others do not interfere. Until a human being does interfere, the duty terminal is practically of no importance.

If now we regard the right of corporal integrity analytically, we will find that it consists of countless two-pole relationships, each one having a dominant pole, represented by the human being just born, and a servient pole, represented by one single human being. In other words, the person born will be in separate legal relationship to each other person. Here it is clear that these countless separate relations are appearing and disappearing in every moment of time. They are unreckoned and practically of no importance until one of these human beings interferes, when the situation becomes a matter of the highest importance. Until the moment of interference, the emphasis is not on persons but on the object of the right. Factual differences of opportunity to interfere are wholly disregarded. The man who lives at Cairo, Illinois, owes the same duty to a child just born at Chicago, as does the man living upstairs.

Acts and Events. Acts. Jural facts fall into two classes—acts and events. A jural act is the result of human action plus rules of law, which immediately create a jural relation. Thus, when *B* makes an offer of contract to *A*, if *A* ‘accepts’ the offer, the

'acceptance' plus the rules of law that apply, creates a legal relation between A and B . This situation may be described by symbols, as follows:



In the above linear graph, we have the proposition of an act of A , done for the promise of B . The result is a contract binding B to A to perform an act. It will be observed that in the series there are three legal relations and two jural acts. Each of the two jural acts (Nos. 2 and 4) is followed directly by a legal relation (Nos. 3 and 5).

The direct effect of the offer (No. 2) is to create (No. 3). The direct effect of the acceptance (No. 4) is to create the contract (No. 5).

As a collateral issue, it may be noticed that the term 'acceptance', although in settled use, is not an accurate one. This can be quickly appreciated by examining the above diagram. It is clear that the offeree (A) does not 'accept' anything. It must also be noticed that the term 'contract' is used here in the sense of a legal relation. There are in use other variant meanings.

Legal Act. We have shown above the meaning of jural acts. There is a slight departure in the meaning of legal acts. The departure consists in eliminating the juridical element, i. e., the element of legal rules. A legal act is a physical result (not an event) which the law will act upon. Thus, in the above contract illustration, when A performs the act required by B , the result of this act by A in connection with the proposal made by B is a legal result; i. e., it is a result which the law will act upon

by creating the ensuing contract relation. The distinction between 'jural' acts and 'legal' acts is substantial and practical, since the important question always is whether the result (i. e., the fact situation) is one that the law will act upon. The matter of controversy is whether there is a legal act. A result is presented by evidence for consideration by the court. That result may be generative of legal consequences or it may not be. The first step is to determine whether a legal act is found. The distinction, therefore, between 'jural' acts and 'legal' acts is purely procedural. Jural acts are never in question; they are the results reached after the questions of evidence and legal rules are settled.

The term 'legal' is not synonymous with lawful. If *A* commits a battery on *B*, *A*'s act is a 'legal' act and it is also an unlawful act.

Physical Act. Physical acts are entirely different from legal or jural acts. In the strictest sense, a physical act is a movement of a human being, having external effects. In a word, it is any movement of human tissue which affects another. The beating of the heart is not a physical act, but the movement of the tongue which utters slanderous words is a physical act.

The term 'physical' act is of no importance except for the purpose of fixing responsibility. The great difficulty, in general, is in determining the pattern of liability and not in finding causation. The fact situation, while very often controverted, does not present in itself the difficulties of fixing responsibility. The real difficulty is in finding the standard or the rule applicable to the facts. The starting point in any analysis of jural causation is always a result which is, or which is asserted to be, a legal result, and, therefore, the cause of a jural relation.

There is in current use everywhere the term 'proximate cause.' This term is employed to find in a chain of causes the significant one for the purposes of responsibility. The assumption underlying the process of discovery is that the causal chain of physical facts will disclose the 'proximate' cause which may be physically near or remote from the harmful result. Professor Green has already exposed the falsity of this course of reasoning. The thing sought for is not in the physical facts but can be found only in the rules or standards of law. It is, in the last analysis, a determination whether a harmful result is a legal act for which some one is legally accountable. Causation is infinite and indefinable. The term 'proximate' cause can only usefully indicate the summation of the factors upon which liability is predicated, but since it is not understood in that sense, it can, with distinct advantage, be abolished from legal terminology.

Physical acts do not have a positive and negative form. There are only positive physical acts. Legal acts and jural acts, on the contrary, have both a positive and negative form. If *A*'s servant *B*, in the course of duty, inflicts a harm on *C*, the physical acts are the muscular movements of *B*. The legal act (e. g., harm to *C*'s chattel) is *B*'s positive legal act because it is traceable to *B* in a chain of physical motions. Assuming that *A* is responsible, the harm is not *A*'s positive legal act, but it is his negative legal act. The utility of this distinction lies in the fact that *A* is legally responsible. It is desirable in jural accounting to work out this responsibility on the basis of acts, and, since the act (i. e., the harm) is not *A*'s positive (legal) act, it must, on that basis, be *A*'s negative legal act.

This use of terms will be best made clear by an example. Suppose that *B* owes *A* a performance and that *B* does not perform. Here, since there was no performance, there is no relevant physical act. There was a negative legal act (i. e., the result of non-performance). There was also a negative jural act (i. e., a negative legal act resulting in liability).

Let us put another example. *B* owes *A* a duty not to harm him corporally. Suppose *B* is driving a train now in motion, and, later, *A* is discovered in a position of danger and that *B* can obviate the peril by a physical act (e. g., stopping the engine) and that if *A* is harmed, *B* will be responsible. There is no physical act when the situation reaches the circle of relevant facts. That *B* started the engine many miles away is not of any legal importance except to fix the fact of duty to act physically later. When the engine was started by *B*, he already owed *A* a duty not to harm him, but the later facts created an entirely new and different duty. The first duty is called an unpolarized duty—it involved a negative jural act, not owing any more to *A* than to other persons. But when the situation of danger presented itself, a new duty arose to do what could reasonably be done, if the doing of it would obviate the harm. This new duty was a polarized duty owing by *B* to *A* and not owing to any other person. *B* did not act when the peril became apparent and harm resulted. There was no relevant physical act by *B*. The *legal* act was negative both as to *B* and to *A*. *B* is responsible and *A* is the dominus of a (new) claim to be compensated.

In the last example, the interesting point to note is that if we posit the unpolarized negative duty as the basis of responsibility, that negative duty was violated by a negative legal act. Duty and violation

of duty are legal contraries and this logical fact indicates that the analysis needs further reduction. We do not find that logical discordance if we posit the polarized positive duty.

This explanation necessarily somewhat abstract, is a matter of the greatest practical importance for legal analysis, since the legal situation can not accurately be analyzed if the premisses are not clearly understood. The point made also shows how pure logic and pure jural analysis may be serviceable—and even necessary—in familiar legal operations which often, because of their familiarity, are accepted as correct when they embody serious and dangerous assumptions which may and do lead to technically and socially unjustifiable results.

Events. Jural relations are created and destroyed not only by legal acts but also by legal events. Acts and events are often inseparably connected so that it is not easy to separate them. It has been said that acts are those facts subject to the control of the human will and that events are the facts not so subject. This formula, however, has a deceptive clarity and it will be found that its terms are undefined and probably also are indefinable.

The difficulty of finding a distinction may be seen in the following examples. A man incites his dog to attack another's dog, whereby the dog attacked is killed. Is the death *A*'s act? A man carelessly overheats his furnace and the house, covered by insurance, burns. Is the destruction of the house his act? *P* says to *A*, I make you my agent to sell my horse. Assuming that a power of agency is now created, is the existence of that power in *A* the act of *P*? A boy puts a coin on the steel rail of a railroad; a train comes along and flattens the coin. Is the result the boy's act? A man takes poison and dies therefrom.

Is the death his act? A man plants grain in fertile ground and a crop springs up. Is the result his act? A man builds a house in a place visited sometimes by cyclones. A cyclone destroys the house. Is the result the builder's act? A railroad gate tender falls asleep at his post and a fast train kills a man passing over the crossing in reliance on the signals. Is the death the tender's act?

Here we need to notice again the kinds of acts. A physical act can be only positive. The limits of a physical act are narrow—it is a movement of some part of the human body. The physical act is not what is contrasted with events. There is left, therefore, for contrast only the legal act or the jural act. The choice falls to legal acts, since jural acts contain the irrelevant (here) element of legal rules. The solution of the problem, in a word, is that *an act is that which is or can be the content of a jural relation*. Events by elimination are all those other facts not products of a jural relation which create or destroy jural relations.

If lightning strikes a building and it burns, the result is an event and not an act, since the fact was not the content of a jural relation. If the building was insured against the loss, the insurer falls under a duty to tender the indemnity. This duty was fixed by the event, but only as a collateral result.

If a man kills himself, the death is not his act since at that moment there was no legal relationship. The physical act here is clear (e. g., shooting), but a legal act is wanting. Death by suicide, therefore, is an event.

Among the important kinds of legal events are birth, death, the passage of time, ripening of fruits, and destruction of goods by the elements. There is also an important class of events which may be called

juridical facts (e. g., the coming into existence of legal relations). It is the combination of these events with the products of human behavior or the effects produced by natural causation which produces legal phenomena.

In sum, there are *events* which are never the content of jural relations; *acts* which are always the content of jural relations; and *juridical facts* which give effect to the changes in human society produced by nature or by human behavior.

§ 60. Elements of Jural Relationship. If we examine the graphs of jural relations already shown, we will find obviously two chief elements in each relation: (a) two persons; (b) an act.

A jural relation may be figuratively regarded as a form into which can be poured all of the facts of legal reality. Since this form is capable of holding so great a variety of legal matter, it is important to study its parts and to name them for the purpose of being able to deal accurately and understandingly with the products that come from it.

Poles. Each legal relation (i. e., product of the form) will have two poles because the jural form has two poles. All legal relations, therefore, are dypolic. There is a dominant pole represented by the dominus, and a servient pole represented by the servus of the relation.

Polarity. Since each pole is represented by a legal person, each pole must have polarity, meaning by this that there is a legal person at each pole. The polarity of one pole is the dominus; the polarity of the other pole is the servus. In actual legal relations, the polarity is represented by the actual legal persons who are legally related.

It will be noticed that the dominant polarity is put at the left and that the servient polarity is placed to the right of each relation. It might have done the other way, but it would have been troublesome, since we write from left to right, and since all active legal processes proceed invariably from the dominus. No jural act is ever performed by the servus of that relation. Thus, the servus of a duty never performs the duty-act as servus, but always as the dominus of a power. In other words, the only way a duty can be performed is by way of power to perform it.

Terminals. Each jural relation is accompanied for purposes of spoken language by such terms as Claim, Duty, etc. These are the terminals of jural relations and of specific legal relations. There are four basic jural terminals falling into two basic classes of correlatives (e. g., Claim and Duty). There are also four derivative or reciprocating terminals falling likewise into two other classes.

The mechanical features of the form of jural relationship having been named, we may pass on to the elements.

Acts. Each jural relation 'contains' an act. That is what is meant by the 'content' of a jural relation. This way of putting it has gained some currency and it might be disturbing to suggest a change of term. Of course a jural relation is not a material substance and it can not contain anything. A jural relation is purely conceptual and the act is the function of the relation. The other features of a jural relation considered as a form or mold remain constant—the poles and polarity do not change as legal fact situations are poured into the mold, but the function of the relation changes in the various ways already shown by the kind of fact material which is en-

countered. This will produce, correspondingly, a change in the terminals but always within narrow formal limits, since there are only two basic relations. The fact situation will be one of Duty or of Power, but the scope of the duty or of the power will change with each new impression made by the mold, so that the most diversified form of legal relationship may be produced. But this figure of speech has its own narrow limits and the suggestion is repelled that the concrete application of legal relations reduces to a mere mechanical process. It is only intended to say that whatever the method of application, the materials of application are reducible to inflexible logical forms of legal behavior.

Acts, therefore, to use another figure, are locked-up energy when they are the content of a jural relation. Every jural relation is a symbol of potential jural energy. Thus, if *A* has a power of appointment over the estate of *B*, the relation is expressive of what *A* can do. If *A* exercises his power by appointing *B*'s estate to *C*, we have kinetic energy. Since a fixed terminology is highly desirable to indicate this process by which the legal energy of acts is locked up and released, we have preferred to choose the terms involution and evolution not in the sense of biology but in the sense of mathematics. Thus, when an act is locked-up in a jural relation we shall say hereafter, when the need arises, that the act is *involved* in the relation. When the act involved in a jural relation is released, we shall say that it is *evolved*.

The specific reason for this choice above other competing terms in mechanics or elsewhere is the convenience of manipulation in different word inflections. We may have such derivative terms as involution and evolution (and for different shades

of meaning devolution and resolution), and involutive and evolutive. To illustrate these terms: Suppose that *A* makes a contractual proposal to *B*. *A* had the power to make the offer because the power act was involved in the relation. The evolution of the power relation was the actual making of the offer. This offer was the involutive fact of *B*'s power to create a contract. *B*'s exercise of power was involved in his relation to *A* after *A*'s proposal. *B*'s power was evolved when he created the contract, and the exercise of the power was the involutive fact of the contract.

In the discussion at this point we are treating acts as involved in jural relations. Acts in the lay sense are always a form of motion, but for juristic purposes acts may be regarded, like potential energy, as being at rest. There is also a usage that speaks of rights (jural relations) in motion but that can not be, and from a juristic standpoint, it is desirable to distinguish sharply between relations and the facts which create, or destroy them. In a jural sense, not even an act can be considered as motion. We have noted three senses of the term 'act' (physical, legal, and jural). None of these varieties can be accurately regarded as motion. All acts are fact situations. All acts are results. This is true even for a physical act. If *A* wounds *B* by firing a pistol, the physical act is the final muscular phenomenon which suffices to cause the discharge of the pistol. The preceding series of muscular contractions is of no legal importance except as evidence of the nature of the end of the series and for identification of the actor. All acts must be considered as results, since nothing in motion is complete. While in fact everything does move and while motion is perpetual, yet for purposes of calculation, it is necessary to posit

points of arrest. This is just as true for jurisprudence as it is for physics. In mathematics, it is necessary for purposes of calculation to accept various fictions such as that of absolute space, surface, line, point, etc. The law also needs devices of an analogous kind. The juristic conception of acts, whether physical, legal, or jural, falls in that class. The idea of jural relation itself is also such a rationalizing instrument. We now pass on to consider still another of the elements.

Persons. A person for a layman is always a human being; but in jurisprudence a human being is only a chattel; i. e., a material substance knowable by the senses. A person in jurisprudence (i. e., legal person, *persona*) is not material substance but only a concept. The dominus of a legal relation, therefore, is not a given human being but a conceptual or ideal person not knowable by the senses but existing only in thought.

Rights are attributed for some purposes to human beings in embryo, and sometimes even before conception. Sometimes a responsibility may be attributed to a dead man. It often happens that the same human being may be two or more legal persons, as when he becomes an executor. Sometimes two or more persons may unite for the purpose of creating a new legal person, as in the case of partnerships or corporations.

The prevailing professional view is that there are two classes of legal persons: (a) human beings and (b) so-called moral, juristic, or artificial persons. The view taken here is that there is but one class of legal persons (i. e., conceptual legal persons) and that these legal persons differ only in their substrates. A natural legal person always has for its substrate a human being. A corporation aggregate,

or a partnership (when considered as an entity) has for its substrate a plurality of human beings. A foundation (an institution very familiar in European law) has for its substrate an aggregate of rights or objects which may be owned. There is also a form of 'corporation' called corporation sole known in Church law whose substrate is a succession of human beings (e. g., The Catholic Bishop of Chicago). The substrate of a legal person may be a human being, a plurality of human beings, a succession (with discontinuity) of human beings, a human being who is the substrate of another legal person; it may consist also of economic goods, or of rights.

The idea of legal personification is in practice even carried farther. The State is a legal person having for its substrate an organized human society wholly indefinite in its membership from moment to moment. In effect the substrate here is not so much an aggregate of human beings as a form of social motion. Still another form of substrate is found in a court and certain other kinds of office. If the judge at a court dies, the court does not cease to exist. Here the substrate in essence is the political idea of organization. We see, therefore, that personateness, a pure concept, may have for its substrate, human beings, objects, motion, or organization. Since personateness may have this wide range, it is not impossible that it might have even a wider range to anticipate a future substrate, and this, in fact, is what occurs when a corporation is organized before the payment of capital.

The conceptual view of personateness is not in conflict with realism, but is a device to further realism by facilitating its operations. The mathematical analogy may again be here invoked. The object of personateness is to further the needs and wants of

human society. The first necessity for such an idea is found in the State itself. Later its need is felt in the organization of local governments and for promotion of economic enterprises by private persons. The same purpose is and may be served by the device of the trust, and the trust, in principle, was an institution much earlier than the corporation in its modern form. The family and clan organization of early society was the progenitor alike of the trust known to prætorian law and to English equity as well as the corporation of later times. There was need of working out the common interests of many persons. In the clan and family of early law this was accomplished by the assumption of power in councils of the elders. Later, the interested persons had a voice in the acts of the elders, and, later still, the primary idea had a vigorous unfoldment in various directions. There are today three chief survivals of the original institution: (a) commercial societies; (b) the trust; and (c) the family council of European law. The detail of the matter must be passed over.

The view of the conceptual nature of partnership entities and of corporations prevails in our law, though not without vigorous dissent. But the question may well be raised, What is the need of the conceptual theory in the case of human beings who at the last are the centers of all social interests and of all social activities? Instances have been suggested where existent human beings are the holders of rights or the bearers of ligations. Instances are adducible where rights or ligations may antedate or postdate human existence. Unborn persons may have estates or be the victims of negligence. Dead men may make contracts and be guilty of torts. These instances may be catalogued, perhaps, as

abnormalities to be dealt with as one can. The emotion of despair or irritation may be indulged for the case of the corporation sole or the man with multiple legal personateness. It will be said with acuteness, if not also with irrelevance, that Siamese twins are two human beings. And it may be asked, when an executor is imprisoned for a misfeasance in the course of duty, what legal person has been jailed?

There can be no ultimate proof for the view here advanced any more than for a demonstration in geometry. There are several kinds of geometry and they are all workable but not equally workable for the same given situation. All science, as Mach said, is an economy of thought, and the controlling question here is one of human art and not of unappealable truth. The conceptual theory works better as a pragmatic tool than the so-called 'real' theory because it is simpler and therefore more coherent. Celestial mechanics may be explained by the Ptolemaic or by the Copernican apparatus. The latter is preferred not because it is demonstrably true, but because it is logically simpler and more coherent. The same observation applies to our problem.

There is yet another reason supplied by logic which can be briefly stated. A relation is conceptual. Therefore, the elements of a relation are also conceptual. This logical fact does not, it may be pointed out, lead to any affirmation of any sort regarding the existence or non-existence of human beings or of things in themselves. That problem is one for a metaphysician and not for the mere lawyer. Legal reasoning, like other reasoning, is a mental process whose elements are conceptual points of reference. The legal person, therefore, is such a conceptual

point of reference for the mental manipulation of jural relations.

It follows, since human beings (if they do in fact exist) are not the *domini* or *servi* of legal relations, that they can not be distinguished in legal science from other material substances. In a word, human beings may be the objects of legal relations, but they never can be the subjects of these relations. Are human beings to be placed in the same class as other chattels? The answer is Yes and also No. There are various kinds of chattels which differ according to their legal situation. For example, coined money of the government is in an entirely different class from other ear-marked chattels. A thief may make a lawful tender of stolen money to his creditor. The creditor after accepting it innocently, may keep it against the person defrauded. A borrower may tender back different coins. It is a crime to clip coined money. At common law, human beings might be replevied. Dead human bodies may still be replevied and living human bodies are restored to relatives by *habeas corpus*. There may be trespass to the human body. There may also be trespass to an ox. Human beings may be defamed, but so also may goods be defamed. In a word, harms done to the human body are matched by harms to other chattels without anything to point out substantial differences in ultimate legal character in procedural remedies. But, it will be said, no chattel can accomplish its own release from imprisonment by way of *habeas corpus*. To this it must be answered that no human being that is imprisoned can obtain his own release either, by way of *habeas corpus*. And this also answers the question of the imprisoned executor. Since the explanation may not be obvious to all readers, we take leave to state it.

When the executor is imprisoned for a misfeasance as executor, it is clear that the material substrate (the human body) of the executor is in durance. Since he has a persona as executor, it is also clear that the persona was not imprisoned because it is only a concept without dimension or locality. According to the view represented here, there is for this case one human being and two legal persons. One of these legal persons may be identified as Smith, a merchant. The other legal person is known to the law as Smith, executor. Both legal persons for different purposes function practically through the same human being who may now be called Smith, homo. Smith, homo, is imprisoned, but Smith, the merchant, and Smith, the executor, are still at large. But then someone may interpose that the probate court failed to do what it set out to do—it did not succeed in imprisoning Smith, the executor. This is, indeed, a sad state of things. At this point one wonders in the face of such manifest injustice, what a court would do if one of the Siamese twins committed larceny. And then again one remembers with pain the case of a dependent household with starving children and an invalid mother where the innocent are punished when the offending husband and father is deprived of his freedom.

The instance put is of interest for the problem of discerning the point of separation of one legal person from another when the human substrate coincides. Here the problem is the same, as, for example, in chemistry. Two essentially different chemical compounds may give precisely the same reaction in one or more tests. If a theory of difference is to be demonstrated, the tests must be continued in other directions. Apply that method of research here. Let us assume that a money judgment is entered

against Smith, executor. There are leviable goods belonging to Smith, the merchant, and other leviable goods belonging to Smith, executor. If the sheriff levies on goods of Smith, the merchant, can Smith, the merchant sue? If he can—and that seems to be the fact—then we have proved by a different test that the persona of Smith, executor, and of Smith, merchant, are different.

It remains to point out one essential and highly important difference between a living human being and other chattels. The living human being is the only kind of chattel which can perform acts. In a lay sense, the lower animals also can act, but in law, these motions and the results of them are regarded only as events. It is by this principle of human action that the conceptual apparatus of jural relations is humanly experienced.

Having isolated the persona and shown its existence apart from homo, it will be desirable to state two definitions of considerable importance.

Legal person. A legal person is a conceptual point of reference created by the law for the attribution of rights and ligations. The law may and does fix the conditions for the creation of legal persons. There is here an inherent constitutional factor which is the starting point of juridical law. When a social organization begins to manifest juridical qualities it attributes personateness to all normal human beings that enter into the organization excepting only those who are slaves or aliens. Human societies are not the only kind of organized societies that have law. Colonies of bees and ants, for example, have a scheme of social order not unlike that of human societies, but a human society organized as a juridical society is physically superior to any other social organization in the same territory. Since human

beings are the members of juridical societies, the personateness of these members is a constitutional principle.

In the early history of law, there are always smaller social units (e. g. the family) which exhibit the germinal ideas of personateness, but it is not until law has reached a high level that it occurs to the lawyer to disassociate the idea of personateness and humanity. Even to this day, the notion prevails that human beings are legal persons. We have seen that personateness is purely conceptual and that the law may attribute personateness to any identifiable physical phenomenon including even social tendencies and even the idea of organization. The rights and ligations attributed to the conceptual persona (i. e., the legal person) are in the end practically realized through the activities of human beings.

Legal personality. Legal personality is the sum total of all the rights and ligations of a persona. There are wide differences in personæ. For example, the persona attributed to a human being is more extensive in capacity for rights and ligations than the persona attributed to an aggregate of persons associated in the form of a corporation. For example, the persona represented by Smith, homo, may have the authorities and responsibilities of marriage and of parenthood. It may have the right of privacy. It may have the right against mental disturbance. Similar relations can not be had, for example, by a corporation sole even though here, the substrate is a single human being.

Every legal person must have capacity for some one or more jural relations. No entity entirely devoid of legal capacity for jural relationship can be a

legal person. Legal capacity is the quality of legal personateness.

The jural relations in which a jural person stands are the measure of his jural personality. Just as there are very many differences in the jural capacities of jural persons, so also are there wide differences in the capabilities of jural persons. Capacity is the measure of what the jural person may acquire by way of jural relationship. Capability is what the jural person actually has acquired in jural relationship.

These two additional terms, capacity and capability, may be illustrated by a physical example. A freight car may have capacity for a stated weight and bulk. This weight and bulk may be of different sorts of material goods. When these goods are put into the freight car, capacity becomes actualized and is now capability. Legal capability is the quality of legal personality, just as legal capacity is the quality of legal personateness. These distinctions are valuable in marking out precisely the subject of discourse, but it needs to be said that like other terms already noted, they do not have that inflexibility in current professional speech. Our entire professional terminology is like a machine where, because of looseness of play in the operating levers, there is much unnecessary vibration, friction, and lost power.

Jural things. We have discussed above acts and persons which are the primary elements in jural relationship. The evolution of every jural relation produces a certain jural and also a factual result. This result is the jural thing or object of the relation. For example, when a debtor tenders his debt to the creditor, he performs a duty. Jurally, the result has the effect of avoiding for the time being a breach of duty. That is to say, the tender of the

debt, if refused, does not resolve the debt relation. The debtor still owes the debt and must tender again on demand. In a word, the legal effect here is to transmute a time duty into a demand duty.

The jural effect also puts the creditor in a position where he may, if he chooses, take the object tendered (e. g., money). In a word, it creates in the creditor a power he did not have before. The factual side of the matter is represented by the economic situation that arises upon a tender.

Jural things are not strictly elements of a jural relation. They are situations of law (and also of fact) to which the jural relation is directed.

Elements of jural things. Since a jural thing is a situation it must be complex. Our purpose here is to state the irreducible elements that enter into it. It will be found on examination of any jural relation that when its object is realized, it is analyzable into space or motion or matter or into some combination of them. It has been observed that jural relations are never presented in isolation from other jural relations. It is likewise true, it seems, that thing elements are never presented in simple form. For example, the duty not to intrude on another's land space (e. g., the superjacent area) when performed is analyzable into negative motion (i. e., to refrain) from invading the land space. Here the situation involves two elements—motion and space. To illustrate again by a more difficult situation, the duty not to harm another by defamation is analyzable into negative motion (i. e., not to defame) and positive motion (i. e., the motions developing business and social connections) proceeding from other human beings. As a matter of curiosity, it will be observed that the ultimate things here are two forms of motion, one negative and the other positive. Illustra-

tions involving matter are abundant and readily suggest themselves.

There are also more complex forms of jural things. One example may suffice. The purpose to be realized by the right of possession is an undisturbed detention of an object by the dominus of the right. The realization of this purpose involves something more than negative motion and matter which are the ultimate thing elements of the right. It involves also a relation between a human being and an object. We have not yet suggested a name for this kind of a relation. The relation is clearly of jural significance and it must be labeled and in such a way as to be differentiable from jural relations.

Jural relations without exception are relations of one conceptual person to one other conceptual person. This is the atomic form of jural relationship. The molecular forms of jural relations are combinations of these atomic elements. These complex molecular forms of jural relation may be called Plurinary (plures) relations, suggesting the idea of unity and multiplicity. There can be no jural relationship between a legal person and a human being or between a legal person and an object or between a human being and an object or between two objects. Since the relation of a human being and an object is excluded and since it has jural significance, it may be called an infra-jural relation. Every right has for its jural thing some form of infra-jural relation.

§ 61. Jural Symbology. We have proceeded far enough now to introduce the idea of expressing jural phenomena by means of symbols. It has been seen that a jural relation is a logical construct and that it involves the idea of potential jural energy as expressed by the term act, the act being the function

of the relation and becoming realized in jural things. The logical structure of these operations is simple and precise, and equivalent in point of reliability of manipulation to the symbols and notation of mathematics and logic. It may be noticed to be especially emphasized, that the symbols already employed for the basic jural relations do not in fact rest on words.

It is common knowledge that our ideas of reality can not be demonstrated to be true copies of reality. On the contrary, it is fairly supposable that our ideas of reality are not counterparts of reality. It is, moreover, clear that words are not copies of ideas. If the difference between reality and ideas of reality is no greater than that of ideas and words, then that difference is a very important one. It is one of the inherent infirmities of law that it must be expressed in words to accomplish its mission in modern times, of providing a guide to future conduct, especially for the security of commercial transactions. The word apparatus now available to chart reliably the course of constrained behavior, is so faulty that much of the labor of the legal profession is substantially wasted at untold cost to human society. The superstructure of professional terminology, to be even tolerably adequate, must be based on a sound juristic foundation. We are not concerned here with the superstructure of terminology but only with the juristic foundations of that terminology. How far the superstructure may be reformed is not here the question.

We emphasize, again, that the structure of jural relations in two basic forms is not a verbal device but a logical paradigm. Being a logical form, it escapes the defects already indicated. There can be no discordance here between word and idea. Therefore, the phenomena of law may be indicated re-

liably by a system of symbols built up on the two basic forms of Duty and Power. It is well known that books on the higher mathematics may be written entirely, or with a minimum of verbal explanation, in symbols. Can the same method be employed for legal reasoning? We believe the clear answer is that it can be done. We believe that legal reasoning can be carried out completely by symbols. But it is a question how far the effort to create the necessary symbols will be practically realizable and useful. Some examples have already been shown of the possibility of stating pasigraphically a given problem in a historical series. Much more is possible. No effort has been made to symbolize the character of the acts involved in jural relations. It is clear that we have only to invent the symbols to show what these acts are to achieve a long advance. Until the logic profession is ready to accept the little already offered, and until it becomes generally familiar, nothing will be gained in attempting to pursue the problem. It may, however, be pointed out that the question of symbology may have various solutions. It may be a complete system which avoids words altogether, beyond a preliminary identification of the thing to be treated. At the other extreme, it may rest with a minimum degree of symbology. It suffices here to indicate the possibilities of constructing a medium by which legal ideas may be more reliably communicated.

At this point, we may take brief notice of a hopelessly misguided objection that often is urged against the effort to isolate the forms of legal thought. It is said that the law is not logical and that experience, emotion, prejudice, and mistake, play as great a part, or perhaps, even a greater part, than logic. This objection confuses two distinct things. The

creation of legal rules is one of these things and legal reasoning is the other. We have already earlier referred to the same matter, but the objection is specifically urged against the jural paradigm of Claim-Duty and Power-Liability. The matter may be disposed of by a few words. In the creation of new legal rules, whether by a legislator or by a judge, logic is unimportant and even out of place. A certain object is sought. That object may be the general welfare, the welfare of a class, or even the welfare of a small interested group. There is no room here for logic. The pursuit of an end is not a matter of reason but of the will. The coexistence of reasonable ideas, the evaluation of purpose, the measurement of means, the anticipation of reactions and like concomitants, do not make the process a logical one. It remains an exertion of the will, even though the effort is aided by reasoning devices. But the rule being given, and the question being the application of the rule to given facts, or even the discovery of the rule by analogical methods, it is a matter primarily of logic, whatever may be the concomitants of emotion, prejudice or ignorance. In a word, the effort to discover and isolate the logical forms of legal reasoning has no connection with the creation of legal rules. What is to be done with these logical forms depends on the legal rules if, as, and when they are ascertained. If a new rule is made, the creation of it by judge or legislator is not a matter of logic at all, except only so far as analogical reasoning is used. The creation of a new rule may be conditioned partly by logic or it may entirely avoid logical methods. But if and when the rule is given or ascertained, it becomes the premiss of logical reasoning.

Jural relations have the nature of transcendental forms, at least to the extent that they precede legal rules and concrete legal relations, but concrete legal relations are created by rules of law which must operate with the technic of jural relations (i. e., abstract logical forms applicable to legal behavior). It must, therefore, be apparent that jural relations do not determine in advance what legal rules must be made any more than a mold can determine what material substances will be poured into it.

While, therefore, the technic of jural relations (i. e., the abstract forms) does not predetermine concrete legal rules or concrete legal relationships, yet, at times, it may point out error in existing legal rules when the basis of the rules is disclosed. For example, it is supposed that a power not 'coupled with an interest' (e. g., to sell a chattel security) is extinguished by the death of the grantor. The theory of this rule is that since the grantee of the power must proceed in the principal's name, the power can not be exercised when the principal is dead. This reasoning is erroneous in two ways. First, it assumes that the power can only be exercised by invoking the name of the constituent. This is false doctrine, attributable to an entirely misconceived idea of the nature of a jural power. Secondly, the doctrine rests on the incorrect assumption that human beings and legal persons are the same.

Another instance is that of garnishment where one, or both, of the principal parties are domiciled beyond the State of the garnishee debtor. Here the current doctrine is based on a theory of situs of the debt, when it may be shown by jural analysis that a debt can not have a situs.

Whether, in these cases, the rules would be different if the underlying principle were reformed is not certain, but it can hardly be doubted that many judge-made legal rules would be different if the basic principles were changed. In this direction, jural analysis may have a truly creative mission, although its chief function is heuristic.

To sum up these comments, jural symbology may be developed more extensively than has yet been attempted by any jurist, and the chief purpose of this method is to make legal reasoning more reliable in its premisses and in its results.

§ 62. Zygnomic and Mesonomic Relations. This category is one of the leading and one of the most important of juristic devices to clarify the process of legal reasoning. The distinction must for a moment be postponed until it can be illustrated by concrete examples. In the foregoing text (§ 59) a graphic illustration is set out of a contractual proposal ending in a contract. It would be impossible to state such a series in precise and accurate terms without the various distinctions dealing with jural relations, jural functions (acts) and polarity. Moreover, it would be impossible to state fully such a series without the distinction of zygnomic and mesonomic relations. If the diagram referred to is inspected, it will be seen that the relation symbolizing the power to offer and the relation symbolizing the power to accept the proposal are shown by parenthesis brackets, while the contract relation of claim-duty is shown by use of a square bracket. The parenthesis brackets always indicate mesonomic relations and the square brackets always indicate zygnomic relations.

If *B* makes a contractual offer to *A*, the offer is not a jural relation but a jural act. There can never

be a jural act without a preceding jural relation out of which it is evolved. Before evolution, the act is *involved* in the jural relation. As already shown, while the act is locked up in the preceding relation (i. e., is involved) it is comparable to potential energy. When the act is released (evolved) it is comparable to kinetic energy. It may be noted by way of caution that an event never springs from a jural relation.

Now, to go back a step, the act of offer by *B*, when evolved, creates immediately and directly in *A*, the offeree, a power to accept (i. e., a power to create the contract. Law deals with human behavior, but *B*'s offer did not constrain *A* to do or omit any act, but the offer act did have legal consequences in that it created a power in *A* to create a contract, binding one or the other to a performance depending on the nature of the original proposal. *B*'s power (relation) in no way constrained *A*, and *A*'s power (relation) in no way constrained *B* (or *B* either). But when *A* acted on his power, the immediate effect was to create a contract which did bind *B* or *A* or both of them, depending on the terms of the original proposal.

We see, therefore, in this simple and familiar example an important distinction in the nature of the relations which enter into the series. One kind of relation immediately and directly constrains conduct with the support of the law. The other kind of relation does not.

We have here the root of the distinction between zynomic and mesonomic relations. No relation is a jural relation unless the evolution of the relation has a jural effect (i. e., a result which the law will notice directly or indirectly or immediately or consequentially). Any relation that does not have that

operation is not a jural relation. This distinction is expressed by the terms 'nomic' and 'anomic' relations. The terms 'jural' and 'non-jural' relations are very nearly but not quite synonymous. The term 'jural' is always strictly employed in an abstract sense in contrast with 'legal.' Therefore, the term 'nomic' is broader, indicating both the idea of 'jural' and 'legal'.

Put broadly, the function of mesonomic relations is to initiate or destroy zygnomic relations. In the above example, the function of the mesonomic relations (power to offer and power to accept) was to initiate the ensuing contract. A zygnomic relation is one which works an immediate and direct constraint on human freedom at a given moment with the support of the law. This definition is substantially accurate and it suffices for our present need. By elimination, mesonomic relations are all those nomic relations that remain. Mesonomic relations have many different forms and functions.

A few additional examples will be put to show the ways of practical application of mesonomic relations. The power to commit a tort is mesonomic. The duty to pay damages for the tort is zygnomic. The power to violate a contract is mesonomic. The duty to pay damages is zygnomic. The power of an agent to bind his principal is mesonomic. Here the agent has the power and the principal bears the responsibility. The power of a servant (also called privilege) to use his master's goods in the course of employment is mesonomic. The power of the principal or master to revoke the power of the agent or the privilege of the servant is zygnomic. The power of an owner of land to eject a trespasser is zygnomic. A duty owed by a subject to the sovereign not to commit a crime is mesonomic. The power of a prosecutor to

prosecute a criminal offender is zygnotic. A lawful power of arrest is zygnotic. An immunity from arrest is zygnotic. A claim against the State is mesotic. The claim of a disseisor against the disseisor not to use the land is mesotic, but the claim of the disseisor that the disseisor shall vacate the land is zygnotic. The privilege of an easement holder is zygnotic. The claim of the owner that the easement holder shall not use the land is mesotic. A debt not susceptible of any defense is zygnotic. A debt barred by limitation is mesotic.

The question very properly will be asked, what is the purpose and utility of these distinctions? Is this not merely, even though logically defensible, an unnecessary complication? Does it not merely multiply ideas and words without practical need? These are reasonable questions and they are often asked.

It must be noted here that the terminology already set out which designates in detail the various features of a jural relation and also to some extent the differences in jural relations is only a part of what would follow in a full treatment of the matter. The idea of jural relationship is not an imaginary one; it is clearly demonstrable in the simplest processes of legal reasoning. One might, to take a different course, attempt to treat jural relations like the equations of mathematics or the propositions of logic. But this would be a purely imaginary and figurative method, at once useless and unreliable. It would be like the problem of attempting to hypostatize life on the sun by means of silica bodies in place of carbon compounds which are the basis of organic structures on the earth. The complication introduced by addition of new terms must be admitted, but here the problem is the same as in any other field of knowledge. Before the rise of scientific

chemistry there was no need of a technical language of chemistry. Lay terms, to designate the kinds of matter encountered in the world of human experience, sufficed. Air was air, but now we need to distinguish various specific gases that enter into it.

The progress of science is shown by sharper distinctions. No branch of chemical science could operate with the layman's distinctions of matter. For the layman, there are hard and soft substances, solids, liquids, and gases, bitter and sweet substances, heavy and light substances, etc., expressing the qualities readily apparent to the senses. Chemistry does not take away these useful ideas which are the heritage of the human race, but adds to this stock of ideas others of a technical nature not open to lay observation. The problem here for law is precisely the same. Law is chiefly molar social physics, but often it is necessary to test the materials by chemical methods.

Another objection sometimes met is that difficult Greek or Latin terms are used unnecessarily. Let us see. A layman may speak of a material substance, calling it a rock, and, for many purposes, that will do, but if he wants to know precisely what the rock is, let us say for the purpose of assaying or for information as to electric conductivity, resistance to pressure, absorptive quality, melting point, etc., he will need to know a great deal more than that he is dealing with a rock. A crop of technical terms will at once be encountered. Even the most obvious of the arts become esoteric. The tools, methods, and operations of ordinary carpentry are as esoteric in name to a non-mechanic as the terminology of the special sciences is to the average layman. Specialism of words affects not only all the sciences and all the arts but even games and sports.

The larger part of our language is made up of specialized words. It seems too clear for insistence on the point, that the language of jurisprudence can never be fitted to the mentality and experience of a common jury. If the reader has understood the distinction of zygnomic and mesonomic relations and perceives the importance of that distinction in a precise and accurate analysis of legal problems, he may amuse himself by the effort to find words in common or uncommon use known to lawyers or a jury of the country, to take their place. Likewise, he may find entertainment in finding substitutes for involution and evolution or polarity and polarization, taking heed, of course, that he does not do violence to accepted terms, that he accurately expresses the idea intended, and that he does not suffer abrasions in his contracts with etymology.

Put somewhat roughly, a zygnomic relation is found where the dominus of the relation (a) may constrain the servus (b) with the support of the law. Zygnomic relations may be either of duty (e. g., duty to pay a debt) or of power (e. g., power to eject a trespasser). Often the power of constraint in zygnomic relations affects the natural freedom of movement of the servus, but this is not always true. Thus, in a power of deviation from a highway, the dominus does not cut down the natural power of the servus to use his land, but cuts down the range of legal advantage in which natural freedom may operate. Again, it must be observed that the dominus may constrain the servus in his natural freedom, but if this constraint does not have the support of the law, the power relation is not zygnomic (e. g., power to imprison or to arrest unlawfully). This latter power is a mesonomic relation.

Here the question intrudes itself, why is the power to commit a tort, a jural relation?

The short answer is, because the effect is a legal effect (i. e., one which the law will notice; i. e., for the creation of a legal duty). To put it another way, one can not create a jural relation by tort act or otherwise, unless he had the power, and the power to create a jural relation, therefore, is a jural power. When fire destroys a building, the event is a jural event, and there is no difficulty in regarding any fact causative of jural relations as itself jural, whether that fact be a lawful or an unlawful act or whether it be only an event.

It may be repeated that the importance of mesonomic relations lies chiefly in two features: (a) it enables us to rationalize jural consequences in the creative and destructive phases of jural relationship; and (b) it enables us to write down a jural series where all the jural factors are entered. There is still another, a third, important function served by mesonomic relations which can not be detailed here—it makes it possible to rationalize the problems of what is called jural conflict (e. g., of legal and equitable rights).

Nexal and simple terminals. At this point we introduce another convenient refinement. Each jural relation has a terminal. There are four such basic terminals—Claim, Duty, Power, Liability. It is somewhat cumbersome to speak of a zygnomic or of a mesonomic claim, etc., and, in order to describe the terminal, it will be convenient to use the comparable terms 'nexal' and 'simple,' respectively, leaving the terms zygnomic and mesonomic to designate the whole relation. Therefore, a zygnomic relation has for its terminals a nexal claim and duty or a nexal power and liability. A mesonomic rela-

tion has for its terminals a simple claim and duty or a simple power and liability.

The terms 'nexal' and 'simple' as applied to the terminals, still leave open the cases of relations which unavoidably must be discussed, in an attempt to isolate jural relations, where the relation is anomic. The term recommended for the terminals of anomic relations is 'naked.' Thus, one relieving another in a time of distress may reasonably expect the other's gratitude. But the law does not recognize such a claim as a legal relation. For the purposes of law, the claim is a naked claim, and the duty (of morals, deportment, etc.) is a naked duty.

By way of digression here, but an important one, it must be noticed that the technique of jural relationship is never concerned with physical situations or with subjective states. When we say that one has the power to arrest, to eject a trespasser, to re-enter land, to recapture chattels, to defend himself, to offer a gift, to take possession, etc., we never mean physical power but only jural power. The evolution of the power, however, is dependent on physical power. Likewise, when we say that a man has a claim to the performance of a duty, we do not mean either a physical or a mental situation. A creditor may forget his claim to have a debt paid, but he still has it until the relation is extinguished.

§ 63. Classes of Claims. We attempt here to set out some of the important classes of claims. We shall then set out in a similar way the important classes of powers. It will be noticed that while every claim is exactly correlative to a corresponding duty, and that while every duty is exactly correlative to a corresponding claim, these terminals may, for convenience, be classified separately. The significance

of this method will appear in the first examples given below.

Public and private claims. This category is ambiguous. Either the dominus or the servus may be a public person (an officer of the government or be the State itself), or both persons may be either public or private persons. In a wide sense, a claim of a private person against an officer or against the State, is a public claim. In a narrow sense, a claim of the State against a private person (e. g., to taxes) is a public claim. In the same narrow sense, the duty of a private person to obey the criminal law is a public duty. On these and other connected points there is no settled usage.

Polarized and unpolarized claims. A claim is polarized if the servus is directly pointed out for immediate practical purposes necessarily resulting in affirmative legal consequences. If *A* owes *B* a debt, the claim is polarized, since no other person in the world can owe that same debt, and, since, if *A* does not pay (or tender), there will be a breach of duty. Likewise, if *A* has lawfully agreed with *B* not to do an act, the claim is polarized, since the performance of the duty is unique, and failure to perform (i. e., by positive act here) results in a breach of duty.

If *A* owes *B* a duty not to harm him corporally, the claim is unpolarized, since the relation has no immediate practical importance until there is a breach of duty.

All unpolarized claims are negative (i. e., the duty is negative). Polarized claims may be either negative or positive. If the dominus had a contractual claim against each person in the world (e. g.) not to compete with him in his business, whether the evi-

dence of the contract (relation) was a single contract act or separate contract acts, the relations would be polarized as to each person, although the duties are in each case negative. If each person in a similar way undertook to pay the dominus one dollar each, the relation would also be polarized. The distinction between polarized and unpolarized claims does not rest on the number of like duties but upon the practical importance of identifying or of not identifying the servus of the given relation.

The term, polarized claim, is used here as a substitute for the conventional term 'jus in personam.' The term unpolarized claim likewise is used here as a substitute for the conventional term 'jus in rem.' The conventional terms are very misleading. Every claim must necessarily be in personam, and there can be no claim against a thing (as 'in rem' reads).

This is one of the few instances where a conventional term should no longer be tolerated, since it is demonstrable that it leads to bad results.

This category of polarized and unpolarized claims is a very important one in any arrangement of legal ideas, whether in the form of a code or even for pedagogical purposes. It has for many centuries been the starting point of legal classification.

Personal and proprietary claims. This category is not wholly satisfactory, but we retain it because it is fairly well established among European and Anglo-American jurists.

Personal claims are those having thing-elements not in their nature enjoyable by another. Thus, a man's mental security, his reputation, his corporal integrity, and his physical freedom pertain to him alone. Others may have an interest in them but no other person can have them. They cannot be assigned to another for the other's enjoyment, either

by nature or by law. In ancient law, a man might sell himself into slavery, but even here there is no exception, since freedom is not assigned but destroyed.

Family relations present a somewhat difficult problem for the present purpose. The natural relation of parent and child can not be assigned to another. But another person may adopt the child, so that for nearly all practical purposes, the original relation may be legally reproduced without the natural fact of parentage. Another instance is the Levirate of ancient Hebrew law where, upon the death of a man without children, the brother or nearest kinsman became the husband of the widow. The explanation for these instances is not one based on a transfer of relations but upon a destruction of the relation on one hand and its recreation in new form on the other. And here, too, it may be suggested that in no case can a jural relation actually be assigned or transferred. The term assignment or transfer is a mere figure of speech.

Proprietary claims are those having thing-elements which may be enjoyed by any person. Thus, if *A* owes *B* a debt, *B* may 'assign' the debt to *C*. Whether the law will recognize such an assignment or not is not the test of whether a claim is personal or proprietary. Thus, pension claims may not be assignable, but yet the claims are proprietary. Again, at common law, a chose in action could not be assigned so as to make the assignee the direct dominus of the claim, but in equity it was otherwise. In both cases the claim is proprietary.

The distinction above suggested needs now to be made more precise. When there is a personal claim, the thing-elements are of such a nature that only one person can be uniquely the dominus of that

claim. This is clear for the instances of mental security, corporal integrity, etc., but is not so clear for legal relations that require duties of other persons. Only a parent can be a parent, but the legal relations may be so altered that another person not a parent may claim duties from another's child and exercise powers over him as if he were the parent. This complex of relations may to some extent have a proprietary cast and in other respects be even an economic liability for the parent or the one in loco parentis. The economic factor presents difficulties. In early law one of the purposes of having children, and even many children, was an economic advantage of the head of the family. Even in modern law, a purely contractual arrangement of master and servant may have in it after many years, especially as to household servants, the emotional elements that so largely enter into family life. The difficulties for a clear-cut separation of personal and proprietary claims are readily apparent.

The basis of this dichotomy, as usually stated, is economic value. Proprietary claims have economic value, and personal claims, it is said, do not have economic value. Economic value may be defined as exchange value. The legal relations of husband and wife are said to be personal because they are said to have no economic value. That is true for modern law simply because these relations can not now be assigned. In primitive law, it was otherwise. Wives were legally in the same category as other possessions. They could be bought and sold and exchanged. The conceptual nature of law is a logical unity and differences in actual legal rules can not be made the basis of legal science, since these differences are merely matters of time and place. The test of assignability is faulty for this reason. The

test of economic value is also faulty because by the definition it rests on assignability.

There are three solutions of these difficulties. The first is to separate claims into two classes: (a) those not in their nature assignable (e. g., freedom); (b) those whose nature makes assignment possible whether the law permits assignment or not (e. g., public office). This dichotomy is unassailable in logic but it does not accord with the legal application of the terminology. This division, therefore, is only what the basis of it points out; viz., of claims assignable or not assignable *ex natura rei*.

The second solution is to arrange claims on the basis of natural and legal assignability. This method of approach will yield (a) claims unassignable by nature; (b) claims assignable by nature but unassignable by law. By this solution some pecuniary claims such as expectancy of dower, fall in the second group (b).

The third solution is a trichotomy based on exchange value and on direct pecuniary measurement, as follows: (a) claims not having direct pecuniary measurement and/or exchange value (e. g., right of reputation); (b) claims having direct pecuniary measurement but having no commercial value (e. g., right of expectant dower); (c) claims having direct pecuniary measurement and exchange value.

The last solution above, probably for modern law, best expresses the distinction attempted by the terms 'personal' and 'proprietary.' The first division corresponds to 'personal' claims; and the second and third divisions correspond to proprietary claims. Personal claims, as above analyzed, include among others: (a) those arising out of the autonomy of the human body (e. g., corporal integrity, reputation); (b) social relations (e. g., marriage); (c)

public relations (e. g., office). Proprietary claims embrace various other relations which reduce to factual relations of human beings to objects or to future services. The term 'personal' is used here in a special sense, in contrast with 'proprietary.' All claims in truth are personal, i. e., they are claims of one person against another person.

The first solution above stated is the only one which is logically independent. The third solution affords the basis of distinguishing the meaning of the terms 'personal' and 'proprietary' in modern law, but the terms on this basis of meaning suffer the disadvantage already pointed out, of presenting a category of legal relativity. It is comparable to the legal division of divisible and indivisible things, or the division of principal and accessory things, which present instances of economic relativity.

Jura in re propria and jura in re aliena. Jus in re propria (a right concerning what one owns) is a right (claim) that has for its subject matter usually something that can be economically used. A chattel (i. e., a perceptible object) is the clearest illustration. The owner of a chattel has a jus in re propria.

A jus in re aliena (a right concerning what another owns) is one which usually limits the scope of use of a thing owned by another. Thus, if *A*, the owner of a chattel, pledges the chattel to *B*, *A* has a jus in re propria and *B* has a jus in re aliena. Here the right of *B* limits the previous rights of *A*. *B* now has the right of possession, but *A* still remains owner.

The terms Ownership and Jus in re propria are not coextensive. It would be a convenience in the use of legal terminology if that were the case, but unfortunately legal terminology has developed an important distinction between the two terms. Ac-

according to that distinction, which was made first by Roman lawyers, *jus in re propria* is a broader term than ownership. From the standpoint of convenience and logic, this is indefensible. The difficulty is this: ownership is not predicated of all rights but only of those based on things (a) having a proprietary nature, and (b) submitting to factual use. Thus, it is not consonant with usage to say that *A owns* his right of reputation, his right of corporal integrity, his right to the obedience of his children, his claim to a contractual performance, his powers (e. g., to offer, to appoint, to defend himself). Analytically, there is no sound objection to saying that every right, whether personal or proprietary and whether in the form of a claim or a power, is owned, but so long as ownership itself is identified with objects submitting to economic use, it would be difficult to change the current of our professional language by a radical departure in the meaning of the term ownership. If all rights can be said to be owned, then the distinction shown disappears, and we can then contrast the ideas of Ownership and Incumbrance in place of the Latin terminology. But it would still be necessary to invent a new term for Ownership, as used in professional discourse, or else to suffer the inconvenience of using the term Ownership and Right of Ownership with different points of reference. A distinguished jurist, the late Sir John Salmond, adopted that solution of the problem.

In this discussion, we shall adhere to the historical analysis of these ideas and we must, therefore, retain the historical Latin terminology. We may now point out some of the applications. All applications of the distinction between *jura in re propria* and *jura in re aliena* fall in the sphere of what is called

Jural Conflict. *A* has a claim of corporal integrity. *B*, in certain circumstances, may invade *A*'s corporal integrity (e. g., in self-defense, in aid of claims to land or chattels). *A*'s claim is a *jus in re propria*. *B*'s conflicting power is a *jus in re aliena*. Again, *A* having a claim to a money performance by his debtor *B*, may make a mortgage of the debt to *C* for collateral security of *C*'s claim against *A*. Here *A* has a *jus in re propria* and *C* has a *jus in re aliena*. Again, *A* may be a lessee of land and may make a sub-lease of part of the premises for part of the term to *B*. Here *A* has a *jus in re propria* and *B* has a *jus in re aliena*. Again, *A* may be a mortgagee of land and may make a sub-mortgage to *B*. Here *A* has a *jus in re propria* and *B* has a *jus in re aliena*. In the last example, it will be noticed that *A* (the mortgagee) is not the owner (where the lien theory prevails) of the land, although he may be called the owner of his right of mortgage.

The last example also presents in clear outline the difficulty of the terminology already discussed. If one asks, What is *A*'s legal position, we can not say that *A* is the owner, since the point of reference clearly in the lay, and even in the professional, mind, is the land. If *A* is a mortgagee, it would be surplusage to say that *A* owns a mortgage right in the land. That is the objection to identifying the right of ownership with *jus in re propria*.

The above discussed classes of Claims (Public and Private, Polarized and Unpolarized, Personal and Proprietary, and *Re Propria* and *Re Aliena*) are the chief classes for purposes of analysis and classification. Some of the minor categories now follow with briefer treatment.

Principal and accessory claims. A principal relation may stand alone without a coincident accessory

relation, but there can not be an accessory relation unless there is a principal relation. Thus, a mortgage claim is accessory to a debt. A guaranty claim is accessory to a debt. A lien claim is accessory to a debt, but in this case it is possible that the debt may be that of a person other than the one who owns the object of the lien, as where a man brings to a hotel baggage borrowed from another.

Another quality of this category of claims is that the dominus of an accessory claim is also the dominus of the principal claim. If *A* has an easement of travel over the land of *B*, *A*'s ownership of land is the principal claim and the claim of the easement is accessory. But in this case, the easement of *A* is not accessory to *B*'s ownership of the servient land. With reference to *A*'s land, the easement claim of *A* is accessory to *A*'s claim of ownership, but with reference to *B*'s servient land, *A*'s claim of easement is a *jus in re aliena*.

The practical test and utility of this class of claims lies in this, that when the principal claim is assigned, the accessory claim also is assigned, without express mention. When a debt is assigned, the assignee is entitled to the security of the debt. Thus, when a note secured by mortgage is assigned, the mortgage security belongs to the assignee of the note.

Continuing and transitory claims. Some claims endure indefinitely; others have more or less definite time limitations which fix the point of their termination. Thus the following claims are continuing claims: the claim to corporal integrity, the claim of ownership in lands or chattels, servitudes which run with the land. But the following are transitory claims: claims to contract performances, claims on time and demand commercial paper, claims to damages, claims to have possession.

It is characteristic of transitory claims that they are affected by statutes of limitation.

Contingent and uncontingent claims. Two preliminary points need to be noticed. In professional parlance, no separation of classes is made for *acts* uncertain to occur and for *events* uncertain to occur. Both are combined under contingency. We follow that usage here. The next point is, that while acts and events may be contingent, yet the claims that are based on them are not contingent. If *A* has guaranteed payment of the debt of *B* to *C*, the claim of *C* against *A* is not contingent in its present existence. It is at present a 'simple' claim (i. e., one of the terms of a mesonomic relation). The contingency is whether *A* will ever, because of *B*'s default, be 'nexally' obligated to *C*.

Where *A* is indebted to *B*, there is contingency whether *A* will ever pay, but *B*'s claim is not because of that, a contingent claim. All rights are contingent in their evolution. Even the claim of corporal integrity is contingent in the evolution of the duty, since there can be no legal certainty that some person will not infringe his duty.

A claim is uncontingent if the correlative duty is required at the present moment or if it is certain to be required in the future as depending (a) on facts which will occur at a time certain (e. g., contract duty performable at a fixed time); (b) on facts certain to happen but uncertain in date (e. g., vested remainder); (c) on facts within the control of the dominus of the claim (e. g., promissory note due on demand).

Positive and negative claims. These claims are distinguished by the character of the duty. *A*'s claim of corporal integrity is correlated by a duty

so to act as not to impair *A*'s corporal integrity. Here the duty is negative; i. e., not to intrude on the sphere of fact represented by *A*'s corporal integrity. If *A* has a claim against *B*, requiring the payment of money, *B*'s duty is positive; i. e., to do acts that reach the physical sphere of the creditor.

The acts to which reference above is made are 'jural' acts (i. e., the functions of jural relations). Jural acts are distinguished in an important practical way from 'legal' acts. Thus, if *A*, by negligence, fails to warn *B*, an invitee, of a dangerous trap on *A*'s land, by reason of which failure to warn *B*, *B* is hurt, the jural act (i. e., the harm to *B*) was positive (i. e., *B* was harmed), but the legal act (i. e., the means by which the harm to *B* was brought about) was negative as to *A* (i. e., *A* failed to warn *B*).

All unpolarized claims are correlated by negative jural acts. The greater number in practical occurrence of polarized claims are correlated by positive jural acts. If *A*, by contract, promises *B* that he will refrain from an act that otherwise he might lawfully do, the jural act involved (i. e., which is the function of the relation) is negative, although the claim is polarized.

Peremptory and non-peremptory claims. These claims also are defined by the nature of the correlative duty. Where there is a peremptory claim, a definite result must be achieved by the servus of the duty without reference to surrounding circumstances. Thus, if *A* owes *B* money, *A* must tender payment, and until *A* pays, his duty is not discharged, no matter what may be the surrounding circumstances (c. g., a bank failure by reason of which *A* is rendered insolvent). In non-peremptory claims, the duty is measured by surrounding circum-

stances. Thus, *A* owes a duty not to harm *B* corporally, but if *A*, while driving an automobile, strikes *B*, due to the contributory fault of *B*, *B* can not recover. Contract law deals with peremptory claims, while tort law deals almost exclusively with non-peremptory claims.

Self-renewing and non-self-renewing claims. Some claims have a substrate, where an unlawful invasion of that substrate results in a renewal of all claims concerning it, by automatic operation, so long only as some part of the substrate remains. Thus, the claim to corporal integrity, although infringed repeatedly by the same person or by different persons, remains as long as the human being lives. The same is true of freedom, of mental security, of reputation, of family relations, of social relations, and of continuing business relations. In some cases, the substrate will be impaired by unlawful invasion, so that, from the standpoint of damages, a subsequent unlawful invasion by the same person or by another, will require a different measure of damages, as where, for example, at different times, *A* and *B* commit trespasses on the chattel of *C*, where each trespass results in an impairment of economic value. Some claims renew themselves in full legal and economic scope after infringement. An example of this is freedom.

Transitory claims are not self-renewing. If a debt is not paid when due, the claim, in general, is extinguished, although a new transitory claim will arise (e. g., to damages).

Frangible and infrangible claims. Some claims, in legal theory, can not be violated. This group includes all those claims which are specifically enforced in law or in equity. Thus, if *A* contracts to

convey to *B* a definite parcel of land, *B*'s claim in equity is infrangible. The corresponding duty can not be violated, since a court of equity in a proper case will decree specific performance. In this instance, there is an accompanying claim not to act unjustifiably. This latter claim is frangible and it is because of the violation of that claim that the court proceeds to decree specific enforcement. The violation of the latter claim is sometimes regarded as a tort, but it seems preferable to regard it as a violation of contract duty. That is the theory adopted in result in bankruptcy in the cases dealing with anticipatory breach.

A debt, at common law, in theory, was the basis of a real action, and its theory was specific enforcement. A common instance of an infrangible claim at law is the enforcement of the claim to money damages. The object here is specific enforcement.

Self-regarding and other-regarding claims. Claims which exist for their own sake are self-regarding claims. Thus, the claim of corporal integrity exists for itself. The realization of the claim ends with an undisturbed condition of the human body. But the claim against assault, so far, if at all, as it is not in substance a claim of mental security, is an other-regarding claim (i. e., for the protection of the claim of corporal integrity). A clearer instance is given above; i. e., where there is a claim to have land conveyed pursuant to an enforceable contract. This claim, as we have seen, is accompanied by another claim not to act unjustifiably with reference to the surrounding circumstances which affect the claim. The protecting claim is, of course, an other-regarding claim.

Other-regarding claims are of two varieties (a) having the dual nature of self-protection and other-

protecting (heterophylaxis); and (b) existing solely for the protection of another claim (allophylaxis). A pledge is an example of heterophylaxis. The instance in the paragraph above is an example of allophylaxis.

Crescent and abruptive claims. Some claims are created by time limitations. Thus, the claim of ownership of land and chattels arising out of adverse occupation depends on a time limitation. There are two forms of crescence: (a) accrescence and (b) decrescence. If *A* adversely occupies the chattel owned by *B*, *A*'s claim, as respects ownership, is accrescent, and *B*'s claim of present ownership is decrescent. In this instance, however, *A*'s accrescent claim does not become a claim of ownership until the last moment of time has elapsed. Likewise, until the last moment fixed by law has elapsed, *B*'s claim of ownership is not extinguished.

The significance of this category lies (a) in the legal method of fixing the creative and destructive effects of crescent claims and (b) in the collateral legal effects during the period of crescence.

Abruptive claims have no time limitation qualifying their creation or destruction. The great bulk of rights in all fields of law are created abruptly. If *A* takes detention of a chattel, the right of possession does not arise until the last moment when there is realized an objective situation in complete form which shows (a) a relation of *A* to the chattel (b) which is normally respected. Again, if *A* makes an offer to *B*, *B* has a reasonable time to act upon the offer. Time here, however, has no connection with the ultimate claim; it is simply a collateral condition. Contract claims will not arise until *B* does an act which presents a complete objective picture of the complex of acts and events which constitute a

so-called acceptance. It matters not how long may be the series or how many the steps in the series; an abruptive claim is not created until the completion of the last step which completes the necessary conceptual image.

Unitary claims and common and joint claims. If *A* owes *B* a debt, the legal relation is dypolic (i. e., there are two jural poles) and dyadic (i. e., there are two legal persons). All legal relations, without exception, reduce to this ultimate form. But when *A* owes a debt to *B* and *C* there is a complication. The creditors may be 'common' creditors or 'joint' creditors. The distinction of 'common' and 'joint' claims is based on the legal rules which govern the creation and destruction of these relations. In other respects the juristic problem is the same.

There are various possible explanations of the juristic situation presented by common and joint claims. For the illustration put, in the case of joint creditors, it is said that there is one claim shared by two creditors; and in the case of common creditors, it is said that there are as many claims as there are creditors. The difficulty as to joint claims is that it is impossible to believe that one claim can be owned by two persons or that one duty can be owing to two persons. As to common claims, it is not easy to see that if there is one duty, for example, to tender payment of a debt, that there can be two claims to that single duty.

The same problem is presented for the case of joint and common duties and for the case of joint and common ownership.

Claims with a discretionary and a non-discretionary function. It will be recalled that the 'function' of a jural relation is the act which is 'involved' in

it. The term 'function' here is used in the mathematical sense, as where, for example, the area of a square is a function of one of its sides.

A judge owes a duty to decide questions properly presented. In general, a judge also owes a duty to litigants, or to the sovereign to decide correctly, but in numerous instances, a judge may choose within limits any one of various possible solutions, especially on the administrative side of adjudication (e. g., number of witnesses on given issues, length of arguments, time to plead). The claims correlative to these duties have a discretionary function. The greater bulk of claims do not have a discretionary function. Thus, the claim not to be harmed by negligence is not correlated by a peremptory duty (as above defined); nor is the duty in this case discretionary (as herein defined).

Claims with single and alternative functions. A debtor may by contract have the choice of one performance or of another. These are called alternative duties. Likewise, a creditor by contract may have the choice of alternative performances. The greater bulk of claims do not have plural functions.

Vested and inchoate claims. The term 'vested' as used here is not contrasted with 'contingent' (as already hereinbefore defined) but is contrasted with 'inchoate.' If *A* owes *B* a debt, *A*'s claim is vested. If the statute of limitations has run on the debt, *A*'s claim is now inchoate. The claim may again become vested by acknowledgement or partial payment. The range of inchoate claims is very wide. It includes all cases of claims which are presently unenforceable but which may later be made enforceable by acts (e. g., signing a memorandum to satisfy the statute of frauds, ratification of an unauthorized

act of a putative agent). It includes also those claims which point to a substrate which for the present can not be realized but which comes into existence through acts or events. Examples of the latter group of inchoate claims are expectancy of dower, mortgages of future crops, and assignments of future wages.

Claims based on present enjoyment or future enjoyment of a substrate. The claims of ownership, of possession, of corporal integrity, of reputation, etc. are based on a present substrate. Claims to future performances or to future enjoyment of an existing or of a future substrate embrace the second division of this class of claims. Examples of the latter division are a landlord's reversion, a pledgor's claim to redemption, claims to have possession, remainders, expectancy of dower, etc.

Claims dependent or not, on notice. This class of claims is very important in the law of trusts, equitable rights, commercial documents, bankruptcy, and elsewhere. For example, an indorsee who takes a note before maturity with notice of a defense good against the payee gets an invalid title. Again, if a man buys a trust res from the trustee without notice of the trust, in good faith, and for value, he gets good title. Again, a creditor who receives payment of an insolvent debtor's debt without reasonable cause to believe etc. does not take a voidable preference. Dependent on the fact of notice, claims are created or destroyed. 'Notice' probably does not mean knowledge but indicates an objective state of facts which normally, under the circumstances, would induce knowledge.

Recusable and irrecusable claims. Recusable claims are created by acts of a human being, as by

a taking (e. g., occupatio, of a gift of an object, of land orally granted) or by acts commonly called 'acceptance' (e. g., of grants, of offers) or by power acts which invest claims in the person exercising the power (e. g., appointment of title to land to oneself, judgments, forfeiture of title, rescission). Irreusable claims are created by events (e. g., birth, death, flow of time) or by lawful acts of others (e. g., appointment of title by the donee of a power) or by unlawful acts of others (e. g., contractual and delictal wrongs).

Claims which run with things. This category in juristic interest compares with the class of claims dependent on or affected by notice. This class has various manifestations. It is not, in fact, an anomaly, but exists as an expression of the very reasonable rule that the assignment of a principal thing carries with it, without express mention, all accessory things. Thus, if a debt secured by pledge is assigned by the creditor to another, without mention of the pledge security, the assignee of the debt is entitled to have the security. Examples of claims which run with the assignment of things are covenants that run with the land. As the law stands today, claims may run as well as duties. Another familiar instance is praedial servitudes. If, for example, Blackacre is burdened by an easement in favor of Whiteacre, the assignment of Whiteacre carries with it in favor of the assignee, the claim of the easement. Likewise, the assignment of Blackacre carries along a duty in the assignee to permit the exercise of the easement. In Roman law, these legal relations were figuratively attributed, not to the owners of the respective tenements, but to the tenements themselves. "Non personae sed praedia debent." Of course, the statement is untrue, since

it is impossible, in an accurate sense, that parcels of land can be in legal relation to each other. Another instance of a similar nature is the real estate tax. In many States, the owner of land does not owe a duty to pay real estate taxes, of such a nature that he may be sued for the tax in an action of debt, but if he does not pay the tax, the Government has the power to sell the land or to forfeit the title. Still other examples of this category, are the legal relations that follow the sale of a going business. The claims arising out of good-will, although not expressly assigned, go (except in certain cases) with the other assets. It has been adjudged in New Jersey that a business may be the dominant tenement of an equitable servitude, and in New York, that a chattel may be a servient tenement.

Legal and equitable claims. Some claims are recognized only in law courts. Others are recognized only in equity courts. Again, some claims are recognized both in law courts and in equity courts. Assertion of these claims is a matter of procedure and dependent on the competence of the court to which they are addressed.

Sanctional and non-sanctional claims. If *A* owes *B* a debt, *A*'s claim is a non-sanctional claim (i. e., the claim itself does not exist as a sanction). The term 'sanction' is generally used by laymen, and very often, also, by lawyers, in the inadmissible sense of 'authority' or 'approval.' As used here, the term sanction always means an evil inflicted by the law, or with the consent of the law, for the breach of a duty. If *B* does not pay his debt at the due date, he breaks his duty. A broken duty no longer exists, but the law inflicts a sanction (i. e., an evil) on the debtor by automatically creating a new

duty to pay damages. That duty can not be violated, but, as in other cases of infrangible duties, it is accompanied by an accessory duty to liquidate the claim (of damages). Later, a judgment may be entered liquidating the claim of damages. The claim, based on the judgment, may be regarded as a sanctional claim based on the breach of duty to liquidate the claim of damages. Later there may be an execution on the judgment followed by levy of the execution and execution sale. These latter steps following the judgment are sanctions, but they do not chiefly fall in the class of claims, but rather in the class of powers, which are not at this point under consideration.

Other terms are in current use to express the distinction of sanctional and non-sanctional claims. Thus, we encounter in juristic writings such classes of terms as *primary* (i. e., non-sanctional) and *secondary* (sanctional); *antecedent* (non-sanctional) and *remedial* (sanctional); *primary* (non-sanctional) and *sanctioning*. These terms are in various ways unsatisfactory, used either singly or in classes, for want of definiteness.

Procedural and non-procedural claims. This category is introduced to take the place of one widely used by lawyers under the terms Substantive and Adjective. The term 'substantive' suggests the idea of 'self-regarding' as applied to a right. The term 'adjective' suggests the idea of 'accessory' as applied to a right. These terms (substantive and adjective) were popularized by Holland in his famous treatise on Jurisprudence and some years later Salmond in his brilliant treatise on Jurisprudence showed conclusively that the attempted distinction sought to be made by the terms, Rights and Remedies, is logically defective. Salmond substituted

for Holland's terms, Substantive and Procedural. We go one step farther by entirely eliminating the term 'substantive.' The reason in a word is that various procedural claims are substantive. For example, a judgment is a procedural claim and certainly it is a substantive claim; i. e., it is self-regarding. A judgment is a commutative claim taking the place of (e. g.) a non-procedural claim to damages which in turn is commutative taking the place of an earlier non-procedural claim. What special terms if any other, should be employed for Non-procedural rights and Remedial rights is another question.

Procedural claims are all those claims arising in litigation from beginning to end; i. e. from summons to execution. Procedural claims may exist in litigation between the parties, and between parties and the officers of government. The following are some of the most obvious of such procedural claims. A litigant has a claim against the clerk of court that the clerk issue a summons. A litigant has a claim against the sheriff that he serve the summons. He has a claim against the judge that his cause be heard. He has a claim against the judge that his claim, if made manifest, be recognized by the appropriate judgment. The litigant has a claim against a witness that the witness testify. He has a claim against his adversary that the adversary do not offer incompetent evidence.

The whole machinery of law, whether in or whether outside of litigation is based on the two levers of claim-duty and power-liability. The same levers operate in cases brought into courts of appeal. There are duties of parties to the litigation and duties of officers of the court.

When a case reaches the highest court of appeal, it is interesting to note that the claims of parties

against the judges to have correct decisions are reduced from a zygnotomic to a mesonomomic level, if the judges as a bench and the court are the same. The reason is that the judges of the highest courts do not owe a nexal duty to decide correctly, unless there is a sanction. We believe, however, that the sounder view is that a bench of judges and a court are not juristically equivalent. The court remains even though all the judges should die at the same moment. The court as a court has a distinct persona, and there is, on this basis, a nexal duty even of a supreme bench of judges to decide correctly since the judgment, if erroneous, (under the declaratory theory of precedent), may be overruled by the court in a later case. The point is very tenuous in all its aspects, but the solution suggested may be supported, we believe, on the ground that when a bench of judges decides incorrectly, the judicial act is not that of the court (since the rule of respondeat superior does not have application here) but is that of the government (i. e. the bench of judges). That a decision later overruled (i. e. in another case) is effective between the parties, is immaterial in this discussion, since the declaratory theory does not operate on facts already litigated.

The view taken here of the distinction between the judge and the court accords with the premiss of a logical unity of the law.

Duties. We have enumerated above, more than a score of classes of claims. The enumeration is based on characteristics of claim-duty relations, touching the polarity of the relation (e. g., public and private); the nature of the substrate of the relations (e. g., personal and proprietary); the nature of the functions of the relations (e. g., positive and negative); external facts affecting the relations

(e. g., notice); and procedural remedies (e. g., legal and equitable). Since claims are exactly correlative to duties, it is clear that the same classification could have been carried out on the basis of claims for some cases (e. g., self-renewing claims) and in other instances on the basis of duties (e. g., discretionary duties) with some advantage in verbal manipulation. It is clear, also, that the same classification could have been effected on the basis solely of duties.

There is a great advantage, however, in basing the classification on claims, instead of duties, because the claim is the primary element and the duty would not be completely stated without the primary element. To employ a metaphor, claims are the nouns of legal language, duties are the adjectives, and the functions (acts) are the verbs and adverbs.

For preliminary purposes, the natural and logical point of departure is the claim, but it needs to be strongly emphasized that in an analytical elaboration of these classes, the duty and function elements are of chief importance. This may readily be made clear by a familiar example. Thus, *A* has a claim of corporal integrity and *X* owes *A* the duty not to impair it. There is only one corporal integrity of *A*, but there are scores of ways by which *A*'s corporal security may be impaired by any single person. Each one of these needs to be completely elaborated in order that the exact range of the claim may be defined. In each instance, also, there are or may be various excuses which will affect the duty. The claim element, therefore is the line of departure, but the duty element is the fan-like extension of the initial line. It is, therefore, apparent that the above enumeration is only a necessary beginning of a very extensive subject matter which em-

braces all the possible aspects in detail of the questions that can arise concerning it. How far this classification which undertakes to set out the leading classes of claims, may be employed in an arrangement of the law is another question. It is obvious, however, that it may, in various ways, be of assistance in grouping the enormous mass of detail which enters into the corpus juris.

§ 64. Classes of Powers. Since there are but two fundamental kinds of jural relations, it remains only to enumerate the significant classes of Powers. The characteristics of various of the classes of Claims above set out apply also to Powers, and it will not be necessary to repeat these classes, but the reader may test his understanding of the classes of claims by an attempt to apply them to Powers.

Lawful and unlawful powers. Power of suit, of self-defense, to make offers of contract, and to create contracts where offers are made, are examples of lawful powers. Since law is manifested only by reactions against unlawful conduct, it is necessary to take account of unlawful powers. Unlawful powers when exercised have a more striking legal effect than the exercise of lawful powers. Examples of unlawful powers are: all acts that violate duties, whether in civil or criminal law (e. g., torts, crimes, breaches of contract). When the law creates a duty it generally gives the servus a power to violate the duty. Even in those instances where a duty is infrangible (e. g., specific performance in equity) the law must create an accessory, prophylactic duty in order that the question, if raised, of failure to perform may be presented, since a court never acts except on the allegation of wrongdoing.

All unlawful powers are reflexive; i. e., the effect of the unlawful conduct reflects back on the wrongdoer by way of a legal sanction. Thus, if a debtor does not pay his debt, the unlawful conduct has this effect: it destroys the debt (for the purposes of the action of *assumpsit*) and it creates a new claim requiring the wrongdoer to pay damages. Here one evil reflects another. The evil inflicted on the creditor is reflected back on the debtor.

Judicial and extra-judicial powers. Some powers are exercisable only in, by, or through a court; others may be exercised without immediate judicial aid.

Examples of judicial powers are: power of a grand jury to present an indictment, power of a criminal prosecutor to act on an indictment when presented, power of a judge to admit or exclude testimony, power of a clerk of court to issue an execution, power of a sheriff to levy an execution, etc., etc.

Examples of extra-judicial powers are: powers to violate duties, contractual powers (i. e., of offer, revocation, acceptance), powers of appointment, power of self-defense, agency powers (i. e., power to constitute agency, to revoke agency, to act as agent), power to sue, to elect remedies, to abandon a right, etc., etc.

It is not usual or correct to speak of the power of a legislature in the making, altering, or abrogation of laws. The correct term here is 'competence.' Where a power is delegated to commissions and other agencies inferior to the supreme legislature, it is common to speak of the power as an 'authority.' In the field of civil agency (e. g., power granted to an agent by a principal to make a contract for the principal) it is common usage to dis-

linguish between authority (as that power which the principal grants as between himself and the agent) and power (as the sum total of the capabilities with which the agent is invested as between the principal and third persons), since in some instances the agent has an apparent authority which exceeds his actual authority.

In connection with the remarks touching the competence of a legislature to legislate, it may be observed, incidentally, that in the power of a court to hear and determine, the distinction between competence and jurisdiction is often confused. Thus, certain kinds of cases are entirely excluded from certain courts. For example, a justice of the peace is not invested with power to decide a case which involves an amount exceeding a certain sum of money. This is a question of competence and not of jurisdiction. Jurisdiction is made up both of lawful and unlawful powers. If a judge decides incorrectly on a question lying within his competence, he exercises an unlawful power of jurisdiction. If a judge decides a case not within his competence, he exercises an unlawful power of non-competence. In the field of so-called Conflict of Laws (Rights of foreign incidence) jurisdiction means the competence of a State to create rights which, under the rules of law, will be recognized in other States.

Powers with advantageous and disadvantageous liabilities. Every Power is correlated by a Liability. Sometimes the liability is economically a burden, but often it is economically a benefit. The power to rescind is a detriment to the servus of the relation. Power of offer of contract, of gift, or of grant, is correlatively a benefit to the offeree, since the offeree has the power to accept or to refuse to accept,

measuring the advantages economically (wide sense) of his act.

This use of the term power has encountered some resistance, but it is believed to be highly convenient in avoiding a multiplication of terms to indicate the same jural relation. In jurisprudence, a liability is always a detriment, since the servus can not escape it, although in economic fact that which he can not avoid is sometimes an economic benefit. Juristic science deals with pure facts and is not concerned directly with social facts, although social facts will generally be determinative of the question, whether in concrete form a power exists or does not exist.

Ingressive and egressive powers. An ingressive power when exercised always creates a new legal relation of which the dominus of the power is a new dominus (of the new relation). Thus, the appointee of a power may appoint to himself. He now becomes the dominus of the claim of ownership in the res appointed. If the same appointee appoints to another, the power exercised is egressive. If *A* offers to *B* a promise for an act, *A*'s power to offer is egressive, but *B*'s power to accept is ingressive. If *A* offers to *B* a promise for a promise, *A*'s power to offer is egressive and *B*'s power to accept is both egressive (as to *B*'s duty) and ingressive (as to *A*'s duty).

Creative and destructive powers. A power is creative when if exercised, it creates a new legal relation. Unlawful powers are always creative. If a tort is committed or a breach of contract, a new legal relation is created (i. e., duty to pay damage). Lawful powers are commonly destructive of legal relations. If a creditor accepts the tender of a debt, he destroys the debt relation.

Standing midway between creative powers and destructive powers are alterative powers. This third term, perhaps, is not juristically accurate, but for some legal operations it conveniently expresses the result. If the terms of a contract are modified in one substantial element among various other substantial elements by a later supplemental agreement, there is the choice of considering that an entirely new contract has been created or of regarding the old contract as having been modified. Where the law takes the latter view (as, for example, with reference to the statute of limitations) the result is conveniently explained as alterative. The possible juristic difficulty is that jural relations are purely ideal and that they can not be treated, therefore, as physical objects, but it would seem that if the terms creative and destructive may be admitted, that the term alterative should not be inadmissible, since the terms creative and destructive, as applied to jural relations, are only highly convenient figures of speech. But there is a limit to which such figures may be advanced, beyond which the disadvantages outweigh the advantages.

Destructive powers may be perfectly destructive, as in the example last given. Destructive powers may also be imperfectly destructive, as where, for example, *P* has made *A* his agent and *A* has had a course of dealing as agent with *T*. *P* may revoke *A*'s authority, but *A*'s power to deal with *T* continues until *T* has notice of the revocation.

Destructive powers may also be commutative or ultimate. A power to sue for damages for breach of a contract or of a tort duty and to take a judgment (claim) is a commutative destruction of the claim to damages. It is also a commutative creation of a new claim (i. e., the judgment is substituted for the

claim to damages). Ultimate destruction is illustrated by a sale of goods under a levy of execution, or by a revocation of an offer, or by a rescission of a title.

Powers are also translatative and substitutive. In a sale of goods or grant of land, the transaction, taken as a whole, operates for practical purposes to vest in the buyer of the chattel or the purchaser of the land, substantially the same legal relations that the seller or vendor had. In actual jural fact, however, the legal relations vested in the buyer or vendee are not necessarily the same legal relations that the seller or vendor had. Yet, ordinarily, the coincidence is complete for most practical purposes. Where a sheriff sells a debtor's goods at execution sale, the title vested by the sale is a substitutive title. Both terms (i. e., translation and substitutive) are metaphorical only, since no jural relation submits to physical manipulation. The terms are commonly used and they are convenient, so long as the metaphor is not carried beyond the range of verbal convenience.

Direct and oblique powers. Direct powers hardly need illustration. All of the examples of powers already given are direct powers. An example of an oblique power is where a debtor by default creates a vested responsibility in his surety to pay the debt. Before the default of the principal debtor, the liability of the surety was inchoate; after default, the liability of the surety became vested.

Powers of unitary and plural function. Commonly powers have a plural function. That function may be reflexive, commutative, or oblique. A power is unitary when only a single relation is created or destroyed by its exercise. Unitary powers probably

do not in fact exist. They can only be thought of as existing by restricting the jural field of reference. For example, to take a simple case, if *A* makes an offer of contract to *B*, the offer creates in *B* a power to create a contract (commonly called a power of acceptance) but this is not all the offer creates. After the offer is made, the offeror has a power of revocation. Therefore, it is clear that the offer act (power act) was both ingressive and egressive. If it may be assumed that an offer is made in such a way as to be legally irrevocable so that an 'acceptance' will create a contract in spite of an attempted revocation, instead of a claim for damages for the revocation, the field is cut down to a minimum, but there remains still the difficulty that the offeree in the case put, has two powers and not simply one. The offeree of such an irrevocable offer has the power to accept or to decline. The act of offer, therefore, had a double function. If this difficulty remains in any form for all cases, the term 'unitary', as applied to the effect of exercising a power, is purely relative with reference to a selected field of jural relations.

Duty and non-duty powers. The power of a sheriff to levy an execution is a duty power, since he owes a duty to the judgment creditor to make the levy. The power of a debtor to tender his debt is also a duty power. This is obvious enough as to the accompanying duty, but it is not perhaps so obvious in the power aspect, since though the debtor tenders his debt, he does not succeed in destroying the debt by the tender. Curiously, for such an instance, it is the creditor alone who has the power to destroy the debt. This is accomplished by exercise of the creditor's power to accept the tender. If the creditor refuses to accept the tender, the debt still remains

and the proof of the proposition is that the creditor may sue and recover. There is, however, a jural power of tender in this, that if, at any rate, the debt is liquidated, the creditor owes a duty when tender is made to accept the tender. The proof of this statement is that if the creditor refuses to accept the tender of a liquidated debt, he will be mulcted for costs. So that we see for the instance put, the power of the debtor to tender and the power of the creditor to accept the tender are both duty powers.

Non-duty powers are illustrated by the power of a landowner to eject a trespasser, the power to make an offer, power to appoint, power to recapture goods, power to rescind, power to elect a remedy.

Non-duty powers are contrasted here with unlawful (contra-duty) powers. The power to commit a tort is a contra-duty power and not a duty power, since for the purposes of distinction, the duty to do or not to do an act, must, in duty powers, be non-conflictive. It is clear that in contra-duty powers, the duty and the power are in conflict. There is a duty (and also a power) to do an act and a (conflictive) power to do the contrary.

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